No. 01-1437-ATX Title: Beatrice Branch, et al., Appellants
v.
John Robert Smith, et al.

Docketed: March 28, 2002 Court: United States District Court for the Southern District of Mississippi

Vide:
01-1596

Entry	Date	Proceedings and Orders
	Feb 26 2002	Application (01A649) for a stay and injunction pending appeal, submitted to Justice Scalia.
	Feb 26 2002	Response to application (01A649) filed by Mississippi Republican Executive Committee.
	Feb 26 2002	(01A649)Supplement to the Application for Stay
	Feb 26 2002	Application (01A649) denied by Justice Scalia.
	Feb 26 2002	Application (01A649) refiled and submitted to Justice Souter.
	Feb 27 2002	(01A649) Application scheduled for the March 1, 2002 Conference
	Feb 27 2002	Application (01A649) referred to the Court by Justice Souter.
	Mar 1 2002	Application (01A649) denied by the Court.
	Mar 28 2002	Statement as to jurisdiction filed. (Response due April 27, 2002)
	Mar 28 2002	Appendix of appellants filed.
	Apr 9 2002	Waiver of right of appellees Eric Clark, et al. to respond filed.
	Apr 24 2002	Supplemental brief of appellants Beatrice Branch, et al. filed.
	Apr 29 2002	Waiver of right of appellee Mississippi Democratic Executive Committee to respond filed.
	Apr 29 2002	Motion of appellee Mississippi Republican Executive Committee to affirm filed. VIDED.
	May 9 2002	Reply brief of appellants Beatrice Branch, et al. filed.
	May 14 2002	DISTRIBUTED for Conference of May 30, 2002
	Jun 3 2002	REDISTRIBUTED for Conference of June 6, 2002
	Jun 10 2002	PROBABLE JURISDICTION NOTED. The cases are consolidated and a total of one hour is allotted for oral argument. SET FOR ARGUMENT December 10, 2002.
		**********
	Jul 5 2002	Order extending time to file the joint appendix and petitioners' briefs on the merits to and including August 26, 2002.
	Jul 18 2002	Motion of Nationalist Movement for leave to file a brief as amicus curiae filed.
	Aug 26 2002	Motion of Nationalist Movement for leave to file a brief as amicus curiae GRANTED.
	Aug 26 2002	Joint appendix filed. VIDED.
	Aug 26 2002	Brief of appellants Beatrice Branch, et al. filed.
	Aug 26 2002	Brief amici curiae of Robert C. Jubelirer and Matthew Ryan filed.
	Aug 26 2002	Brief amici curiae of NAACP, et al. filed.

App

No. 01-1437-ATX

Entry	Date	Proceedings and Orders
	Aug 28 2002	LODGING consisting of one set of fourteen folders containing letters submitted by counsel for amici NAACP, et al.
	Sep 3 2002	Letter waiving right of appellee Mississippi Democratic Executive Committee to file a respondent's brief on the merits filed.
	Sep 26 2002	Brief of appellees John Robert Smith, et al. filed.
	Sep 30 2002	LODGING consisting of twenty sets of three documents received from counsel for appellants.
	Sep 30 2002	Brief amicus curiae of United States filed.
	Oct 10 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Oct 23 2002	CIRCULATED.
	Nov 1 2002	Reply brief of appellants Beatrice Branch, et al. filed.
	Nov 4 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 22 2002	Record filed.
	Dec 10 2002	ARGUED.
	Dec 12 2002	Letter from counsel for the petitioner received and distributed.

Supreme Court, U.S.
FILED

No. 1437 MAR 28 2002

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,

Appellants,

v.

JOHN ROBERT SMITH; SHIRLEY HALL; and GENE WALKER,

and

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

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JURISDICTIONAL STATEMENT

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37pp

QUESTIONS PRESENTED

1. Does Article I, § 4 of the United States Constitution deprive state courts of general jurisdiction of all power in congressional redistricting cases in the many states where no state statute explicitly speaks of such power?

2. If a state court, in the course of adhering to developments in the law, assumes jurisdiction and hears a type of voting rights case it has never heard before, does it thereby "enact or seek to administer [a] voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force and effect on November 1, 1964" (to quote Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c), such that the mere assumption of jurisdiction (independent of any remedial order) must be precleared by the United States Attorney General or the federal district court for the District of Columbia under Section 5?

3. Under Section 5, when a redistricting plan adopted by state authorities has (to quote Section 5) "been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission," may a federal district court nevertheless prevent enforcement and extend the statutory sixty day review period on the basis of the Attorney General's request for additional information if the information sought is unnecessary and irrelevant to the Section 5 retrogression evaluation?

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JURISDICTIONAL STATEMENT

Appellants Beatrice Branch, et al., ask this Court to note probable jurisdiction and reverse the decision of the three-judge court of the United States District Court for the Southern District of Mississippi enjoining implementation of the congressional redistricting plan adopted by the state courts of Mississippi in the wake of the legislature's failure to enact a plan.

OPINIONS BELOW

The opinions and orders of the District Court are reproduced in the appendix as follows: February 26, 2002 (final judgment), 1a; February 26, 2002 (opinion), 4a; February 19, 2002, 25a; February 4, 2002, 62a; January 15, 2002, 90a; December 5, 2001, 107a. The December 13, 2001 order of the Supreme Court of Mississippi is reproduced at 110a. The opinions and orders of the Chancery Court of Hinds County, Mississippi are reproduced as follows: December 31, 2001 (judgment), 113a; December 31, 2001 (order), 115a; December 21, 2001, 117a; December 13, 2001, 161a; December 13, 2001, 164a; December 13, 2001, 166a; December 7, 2001, 168a; December 7, 2001, 171a; December 7, 2001, 175a; December 6, 2001, 178a; December 3, 2001, 180a; December 3, 2001, 183a; November 19, 2001, 187a. None of the opinions and orders are reported.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1253.

STATUTES AND CONSTITUTIONAL PROVISIONS

Article I, § 4 of the United States Constitution provides in part:

> The Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as

to the Places of Chusing Senators.

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, provides in part:

> Whenever a State or political subdivision subject to [this section] shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . such qualification, prerequisite, standard, practice, or procedure may be enforced . . . if [it] has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . .

STATEMENT OF THE CASE

With the 2000 census, Mississippi lost a seat in Congress, its delegation in the next House of Representatives reduced from five to four. In a November special session, the Mississippi legislature could not agree on a new redistricting plan. This was the first time in several decades that the legislature had not adopted a congressional plan after the decennial census. *See*, FRANK R. PARKER, BLACK VOTES COUNT 42 (mentioning 1932, 1952, and 1962 plans); *Jordan v. Winter*, 541 F. Supp. 1135, 1138, 1142 (N.D. Miss. 1982), *rev'd*, 461 U.S. 921 (1983) (mentioning 1972 and 1981 plans). A lawsuit was filed by the appellants here, Beatrice Branch, et al., in the Chancery Court of Hinds County, Mississippi, asking the Court to adopt a plan if the legislature failed to do so. The state defendants (the Governor, Secretary of State, and Attorney General, who collectively comprise the State Board of Election Commissioners) initially moved to dismiss the case, as did several other voters (the Mauldin state court intervenors) who intervened and opposed the plaintiffs. The motions to dismiss

were denied. App. 183a, 187a.[1] The matter was reviewed by the Supreme Court of Mississippi on an interlocutory pretrial petition challenging, among other things, the Chancery Court's jurisdiction. In an order joined by all of the nine Justices except one who dissented without opinion and one who did not participate, the Court held that "the Hinds County Chancery Court has jurisdiction of this matter" and that "[a]ny congressional redistricting plan adopted by the chancery court . . . will remain in effect, subject to any congressional redistricting plan which may be timely adopted by the Legislature." *In Re Mauldin*, No. 2001-M-01891 (Miss. Dec. 13, 2001), App.110a-112a.

The Chancery Court then heard the case during a five-day trial spanning December 14-19. Eleven different plans were submitted into evidence, some by the Branch plaintiffs and others by the Mauldin intervenors. The state defendants did not propose plans, present evidence, or offer argument. On December 21, the Court adopted what was known as Branch Plan 2A. App. 117a .[2]

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[1] The entire state court record, as well as the Section 5 preclearance submission and subsequent Department of Justice letters, have been made a part of the present federal court record.

[2] As the Chancery Court explained, the plan contained a zero deviation and no one contended it violated the substantive standards of either Section 2 or Section 5 of the Voting Rights Act. While in the pre-existing plan, one of five districts was majority black, one of four is majority black in the state court plan. Under the existing five-district plan, the majority-black District 2 had a 61.1% black voting age population (BVAP) under 2000 census data. Under the state court's four-district configuration, which necessarily requires larger districts, District 2 has a 59.02% BVAP, thus retaining a strong BVAP majority. Also, the Chancery Court stated that, among other considerations, it adopted the plan that best provided parity and a competitive district between the supporters of the two incumbents who were thrown together by the loss of a seat. App. 117a-135a.

The state court plan was submitted by the Mississippi Attorney General to the United States Attorney General for Section 5 review on December 26 , well over sixty days prior to the March 1, 2002 candidate qualifying deadline and over five months prior to the June 4 primary election. App. 221a. In an abundance of caution, approval also was requested of the State Supreme Court's December 13 order in *In re Mauldin*, *id.* 227a-228a , but with the usual caveat that the submission of something does not mean the State concedes it is covered by Section 5. *Id.* 225a. On the same day of the submission, December 26, the Deputy Chief of the Voting Section, Civil Rights Division, United States Department of Justice (DOJ), acknowledged receipt in writing and stated the submission "will commence the sixty (60) day time period for administrative review under Section 5 of the Voting Rights Act." *Id.* 220a. The Mississippi Attorney General's submission requested a decision by January 31, 2002 in light of the March 1 qualifying deadline. *Id.* 221-222a, 225a.

In the meantime, the present case was filed asking the United States District Court for the Southern District of Mississippi to order at-large congressional elections in Mississippi, or alternatively to design the plan itself. Named as defendants were the same state officials named in the state court case, as well as the Mississippi Republican and Democratic executive committees. The Branch state court plaintiffs (who are appellants here) were permitted to intervene and advocate deference to the state court plan.

On January 15, 2002, the federal court issued an order stating: "it now appears uncertain whether the State authorities can have a redistricting plan in place by March 1, 2002," and "it is necessary to assert our jurisdiction and to . . . begin to draft a plan for reapportioning Mississippi's congressional districts . . . ." App. 91a. In that order, the federal court concluded not only that the state court plan was a voting change requiring

preclearance, but that the Mississippi Supreme Court's December 13 decision affirming the Chancery Court's jurisdiction also required preclearance. Although never suggesting that the redistricting plan itself was retrogressive, the federal court stated that it had "serious doubts" as to whether the plan and the December 13 decision would be precleared prior to the March 1 qualifying deadline. *Id.* 98a. With respect to the December 13 decision, the federal court said: "it is not at all clear that this change is not retrogressive with respect to minority voting rights, in the sense that redistricting decisions will depend on the individual views of an individual judge, elected by a small percentage of the State's voters." *Id.* 100a. The federal court added:

> [I]t appears to us that, at the very least, the Attorney General of the United States will consider these implications very carefully, and might perhaps request more information from State authorities to clarify what is embodied in the change and the consequences thereof.

Id. 100a. In light of its doubts about preclearance, the federal court said it would set the case for trial.

In the state case, the state defendants did not appeal the Chancery Court decision. However, the Mauldin state court intervenors and the Mississippi Republican Executive Committee (MREC) did.[3] But while claiming to be aggrieved

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[3] The MREC was named a defendant in the present federal case. As a practical matter, it has aligned itself with the Smith federal plaintiffs. The basis for the MREC's standing in the state court proceedings is unclear. Neither the MREC nor the Mississippi Democratic Executive Committee (MDEC) was named as a defendant and neither sought to intervene in the state case, although they could have done so at any point. On December 6, at the request of the state defendants, the Chancery Court ordered the MREC and MDEC joined as necessary parties. App.178a. However, on December 7, the Court reconsidered and vacated the ruling, nevertheless making it clear

by the state court plan, they did not notice their appeal until January 25, 2002, App. 241a, twenty-five days after the Chancery Court's December 31 final judgment, *Id.* 113a, and thirty-five days after its December 21order adopting the plan. *Id.* 117a. None of the state court appellants sought a stay of the Chancery Court plan in the Mississippi Supreme Court or any form of expedited appellate review.

Instead, the MREC and the Smith federal court plaintiffs urged the federal court to displace the state court plan and design its own.[4] Trial commenced in federal court on January 28 and concluded on January 29. The Smith federal court plaintiffs and the MREC submitted a number of proposed plans. The Branch federal court intervenors (who are appellants here and plaintiffs in the state court) continued to urge the federal court to defer to the state court plan. As in the state court, the state defendants did not participate in the federal court trial or offer plans. Neither did the defendant Mississippi Democratic Executive Committee (MDEC). No party in the federal case asserted that the particular lines in the state court plan violated the Fourteenth Amendment, the Voting Rights Act, or any other provision of federal law. Although not challenging the lines themselves, the Smith plaintiffs and the MREC contended that the state courts have no power to adopt a plan in light of Article I, § 4 of the federal constitution.

On February 4, 2002, the Federal District Court announced its own redistricting configuration, stating that its plan would be implemented "absent timely preclearance" of the state court

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that either or both of the executive committees remained free to intervene voluntarily. *Id.* 161a-163a, 171a. Neither did so. It is unclear why the MREC joined in the eventual state court direct appeal.

[4] The attorneys for the Mauldin state court intervenors are among those representing the Smith federal court plaintiffs.

plan. App. 62a. The federal plan was significantly different from the state court's. The federal court made no pretense of adhering to the policies reflected in the state court configuration, particularly in District 3, which in both plans combined the two junior incumbents, one Republican and one Democrat, but which was drawn very differently in the two plans. However, with respect to the majority black district, District 2, the federal plan contained a 59.2% BVAP majority, essentially the same percentage as the 59.0% figure in the state court plan, although the exact geographical composition of the district was different. (The federal plan is described at app. 64a-65a, the state plan at app. 134a-135a).

On February 14, fifty days after the submission of the state court plan, the Chief of the Voting Section of the Civil Rights Division of the DOJ faxed a letter to the Mississippi Attorney General. App. 191a. The letter explained that "the Department is not formally seeking additional information regarding the redistricting plan." *Id.* 195a. Instead, it propounded three pages of questions that it said related to the state supreme court's December 13 ruling, adding that it believed the "basis for the . . . decision is unclear." The Department asked for (among other things) the "state's view of the legal basis for the Mississippi Supreme Court's decision to vest a Chancery Court with jurisdiction to create and implement a statewide redistricting plan;" "detailed information about the nature and structure of state Chancery Courts, e.g., the number . . . of judges, how [they] are selected, . . . the demographic breakdown of the districts from which such judges are selected; . . . the limits imposed on Chancery Court jurisdiction;" a description of "any safeguards in place to ensure that a particular Chancery Court judge who creates and imposes a state-wide redistricting plan has him/herself been selected in a manner reflecting the political influence of the State's minority populations;"a description of "any existing legal procedure that would prevent

a potential litigant from 'forum shopping';" an "explanat[ion of] any laws and/or court rules . . . impacting the selection of venue for state Chancery Courts," and an "explana[tion of] whether Chancery Court decisions are appealable, by right, by any party to the suit." *Id.* 193a-195a. Additionally, the letter asked: "Please explain the state's view of the relationship between this change in procedure [the December 13 ruling] and Miss. Code Annot. 23-15-1039." *Id.* 193a-194a. (§ 1039 provides that if the number of congressional representatives is decreased and the next election is held "before the districts shall have changed to conform to the new apportionment," representatives shall be chosen at-large). According to the letter, "*[the] sixty-day review period will begin when we receive the information specified above*, but we will make all efforts to expedite our review to the extent possible." *Id.* 196a (emphasis added). In addition, the letter stated:

> With respect to the actual congressional redistricting plan submitted by the state, we have concerns about the Department reviewing it while the plan . . . is pending final approval by the Mississippi Supreme Court on direct appeal. In that regard, please see the attached letter to the Chief Justice of that Court, sent this date.

Id. 195a.

The last reference was to an unusual letter sent that same day from the Assistant Attorney General, Civil Rights Division, to the Chief Justice of the Supreme Court of Mississippi. App. 197a. The letter referred to the state court plan that had been submitted for preclearance and stated: "[T]hat plan, *pursuant to an order of your honorable Court*, was originally drafted by the Chancery Court of . . . Hinds County after trial and is now pending before your Court on direct appeal." *Id.* (emphasis added). The letter then stated: "I write to request respectfully that the Mississippi Supreme Court consider expediting its

review of the appeal before it to the extent possible." *Id.* 198a. This request was made even though the United States government is not a party to the state court case, and even though the appellants in that case have not sought from the Mississippi Supreme Court either expedited review or a stay of the Chancery Court plan.

On February 19, the Attorney General of Mississippi submitted a comprehensive response to the Department's February 14 request for more information. App. 200a.

Also on February 19, the Federal District Court issued an opinion stating:

> [I]f the Chancery Court plan has not been precleared before the close of business on Monday, February 25, 2002, the congressional redistricting plan attached to our order of February 4, 2002, shall operate as the plan for congressional districts for the State of Mississippi for the 2002 congressional elections . . . .

App. 61a.

In that opinion, the federal court held that no deference was required because "as of this date, no part of the [state court] plan . . . has been approved by the Attorney General," and because the state court plan, "having been drafted by the Intervenors (plaintiffs in Chancery Court), not by the Chancery Court, and not by the Mississippi Legislature," is "no expression, certainly no clear expression, of state policy on congressional redistricting to which we must defer." App. 31a-32a . The federal court agreed with the DOJ that its request for information started the sixty day review period anew. *Id.* 26a n.1, 33a-34a n.3. The Court also indicated that even if preclearance is granted, it might enjoin the state court plan and implement its own because of the "serious constitutional issue" of whether Article I, § 4 of the United States Constitution prevents the Mississippi courts from adopting congressional

redistricting plans even when the legislature defaults. *Id.* 60a n.7.

In the meantime, nothing more was heard from the DOJ. Monday, February 25, was the first weekday following the sixtieth day after the state court plan had been submitted. It passed uneventfully. On the morning of February 26, the Federal District Court enjoined implementation of the state court plan. App.1a. This was based not only on the absence of preclearance, but also "for the reason that [the plan] violates Article I, Section 4 of the United States Constitution." *Id.* 5a. According to the District Court, a state court cannot adopt a remedial congressional redistricting plan, even where the legislature defaults, unless "some act of the legislature" provides that the state court may do so. *Id.* 7a. The general grant of equitable authority to the courts under state law is not enough, said the District Court. *Id.* 20a. It thus concluded: "[I]rrespective of whether the chancery court plan is precleared, [it] cannot be implemented by the State of Mississippi because . . . the adoption of it . . . violates Article I, Section 4." *Id.* 22a. The Court's injunction required that its own plan be used in the 2002 congressional elections and "all succeeding congressional . . . elections . . . until the State of Mississippi produces a constitutional congressional redistricting plan that is precleared in accordance with the procedures in Section 5 of the Voting Rights Act of 1965." *Id.* 2a.

Shortly thereafter on the same day, February 26, the appellants noticed their appeal. App. 239a. The prior week, on February 20, they had lodged with this Court an application for stay and injunction pending appeal that formally was filed after the District Court's February 26 injunction. Later that same day, February 26, Justice Scalia denied the application. It was resubmitted to Justice Souter, who referred it to the full Court,

which denied it on March 1, 2002. This appeal follows.[5]

THE QUESTIONS ARE SUBSTANTIAL

In *Growe v. Emison*, this Court unanimously held that both legislative and congressional redistricting are governed by the longstanding principle that "state courts have a significant role in redistricting." 507 U.S. 25, 33 (1993). In conformity with that principle, the state courts of Mississippi confronted the problem, unprecedented in that state in the years after *Baker v. Carr*, 369 U.S. 186 (1962), of a total legislative failure to redraw congressional districts after a census. The Chancery Court adopted a plan and it was submitted for preclearance over sixty days prior to the qualifying deadline. None of the parties sought a stay from the Mississippi Supreme Court. Instead, the Federal District Court stepped in and displaced the plan with an unprecedented interpretation of Art. I, § 4 that undermines *Growe v. Emison* and, if affirmed, will leave congressional redistricting disputes almost entirely to the federal courts.

In addition, the Department of Justice subverted the role of the state courts by declining to provide a preclearance decision within the sixty day statutory review period even though the state court plan was properly and timely submitted. Instead, on the fiftieth day, the Department requested unnecessary and irrelevant information about matters that are not voting changes subject to Section 5 review. The District Court incorrectly ruled that this extended the statutory review period for an additional sixty days after the state Attorney General's response. Armed with this extension, the DOJ deliberately allowed the original sixty days and the qualifying deadline to pass without a decision. Even though Section 5's language provides that a plan

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[5] No further word from the DOJ has arrived as of March 26, 2002 despite the Department's February 14 pledge "to expedite our review to the extent possible."

is precleared if it "has been submitted . . . to the Attorney General and [he or she] has not interposed an objection within sixty days," the District Court held the plan had not been precleared and enjoined it on this ground as well.

Given that the District Court's rulings dramatically undermine the proper role of state courts in redistricting cases and interpret Section 5 in a manner distinctly contrary to the statutory language, this Court should note probable jurisdiction and resolve the significant constitutional and statutory questions that arise here.

I. THE DISTRICT COURT'S DECISION, IF AFFIRMED, WOULD OVERRULE *GROWE V. EMISON* AND PRECLUDE THE COURTS OF MOST STATES FROM PLAYING ANY ROLE IN CONGRESSIONAL REDISTRICTING, EVEN WHEN LEGISLATURES DEFAULT.

In *Growe v. Emison,* which involved both legislative and congressional apportionment, this Court said: "The power of the judiciary of a State to require valid reapportionment or to require a valid redistricting plan has not only been recognized by this Court, but . . . has been specifically encouraged." 507 U.S. at 33, *quoting, Scott v. Germano*, 381 U.S. 407, 409 (1965). Moreover, "federal judges [must] defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Growe*, 507 U.S. at 33.

Despite the unanimous holding in *Growe* applying this principle to congressional redistricting, the District Court here held that, in light of Article I, § 4, the courts of Mississippi and all other states are powerless to adopt a congressional plan in the wake of a legislative default unless an "enactment of the . . . legislature grants to the . . . court the power to redistrict . . . for congressional elections." App. 7a. State law provisions giving

the courts general jurisdiction to enforce the law through equitable relief are insufficient, said the District Court. *Id.* 20a.

By holding that the state court plan violates Article I, § 4, the District Court concluded either that this Court was heedless of that provision when it unanimously decided *Growe* as it did or that it silently hinged its decision on two particular Minnesota statutes that never were mentioned in the opinion. The District Court distinguished *Growe* on the grounds that "Article I, Section 4 was not raised in *Growe* . . . and . . . there was some, albeit tenuous, legislative authority for the Minnesota Supreme Court's action in *Growe*." App. 18a. That "legislative authority" involved two Minnesota statutes dealing not with the role of state courts in redistricting, but with the authority of the Chief Justice of the state to "assign any judge of any court to serve . . . in a judicial district not that judge's own," and "to direct any judge . . . to hold court in any county or district where need therefor exists." App. 16a n.8, *quoting*, Minn. Stat. §§ 2.724 and 480.16. The statutes are general in their scope and do not refer to any particular type of case, redistricting or otherwise. They were never mentioned in *Growe*, but instead in a Minnesota Supreme Court opinion eight years later discussing the Chief Justice's authority to appoint a special redistricting panel of three judges to hear the case (which is also what happened in the state court case that formed the backdrop of *Growe*). App. 16a, *citing, Cotlow v. Growe*, 622 N.W.2d 561, 562 (Minn. 2001). The District Court here never explained how these statutes would meet its requirement of an "enactment of the . . . legislature grant[ing] the . . . court the power to redistrict . . . for congressional elections."[6]

Clearly, if the District Court's decision is affirmed, *Growe*

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[6] Mississippi has a similar statute allowing the Chief Justice to assign judges throughout the state. Miss Code Ann. § 9-1-105(2), (6).

v. Emison will be overruled. Minnesota itself does not satisfy the District Court's Art. I, § 4 formula. Moreover, Minnesota is not alone in containing no state statute or constitutional provision that speaks specifically of state court jurisdiction in congressional redistricting cases. Very few states have them. Yet state courts, particularly in the wake of *Growe*, understandably assume this jurisdiction exists. In the present redistricting cycle, courts of a number of states stepped in when legislatures defaulted and assumed jurisdiction in congressional redistricting cases without citing any state statutes that speak to it. *See, e.g., Perry v. Del Rio*, 2001 WL 1285081 (Tex. Oct. 19, 2001); *Beauprez v. Avalos*, 2002 WL 386713 (Colo. Mar 13, 2002) (affirming adoption of plan); *Cotlow v. Growe*, 622 N.W.2d at 563-64; *Zachman v. Kiffmeyer,* No. C0-01-160 (Minn. Special Redist. Panel, Mar. 19, 2002) (adopting plan); *Jepsen v. Vigil-Giron*, No. D0101-CV-2002-02177 (Dist. Ct. of Santa Fe Cty., N.M., Jan. 2, 2002) (adopting plan); *Perrin v. Kitzhaber*, No. 0107-07021 (Cir. Ct. of Multnomah Cty., Oregon, Oct. 19, 2001) (adopting plan).

Thus, affirmance of the District Court's decision not only will overrule *Growe*, but will leave courts of the vast majority of the states devoid of any authority to hear congressional redistricting cases and adopt congressional redistricting plans, even when legislatures fail to act. The field will be left almost entirely to the federal courts.

The District Court here never considered this. In addition, the District Court never confronted or even acknowledged the fact that the Mississippi courts did not deprive the legislature of any of its power. Art. I, § 4 provides that "[t]he Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof." But the Mississippi legislature chose not to prescribe the shape of the districts. Someone had to do it. Nothing in Art. I, § 4 forbids the state courts from enforcing the

law and adopting a plan so that elections can go forward during this difficult situation.

Having lost no power, of course, the legislature remains free to assert its will, prescribe the shape of the districts and supersede the state court plan. The Supreme Court of Mississippi's December 13 order specifically held that any chancery court plan "will remain in effect, *subject to* any congressional redistricting plan which may be timely adopted by the legislature." App. 111a (emphasis added).

This case is unlike *Bush v. Gore*, 531 U.S. 110 (2000), where three justices of this Court concluded in concurrence that the Florida Supreme Court's ruling infringed upon the legislature's decision regarding the standards for choosing presidential electors, thus transgressing Article II, § 1's command that each state appoint its electors "in such Manner as the Legislature thereof may direct." *Id.* at 111 (Rehnquist, C.J., concurring). Contrary to that situation, no one here contended that the pre-existing legislative scheme — in this case, the prior congressional districting plan — could be utilized. It had too many districts and obviously violated what the Mississippi Supreme Court has described as "the one person, one vote standard under the 14th Amendment of the United States Constitution as well as under Miss. Const. Art. 3, § 14." *Adams County Election Commission v. Sanders*, 586 So. 2d 829, 831 (Miss. 1991). Moreover, as previously mentioned, the legislative will here was not thwarted. The legislature retains the prerogative of superseding the state court's decision by enacting its own plan. This is not a case where the state courts cast aside "the clearly expressed intent of the legislature." *Bush v. Gore*, 531 U.S. at 120 (Rehnquist, C.J., concurring).

This Court already has held that the reference in Art. I, §4 to the power of "Congress . . . at any time [to] make or alter such Regulations" for the manner of electing congressional

representatives does not preclude courts from adjudicating congressional redistricting cases and enforcing the law. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court discussed Justice Frankfurter's opinion in *Colegrove v. Green*, 328 U.S. 549 (1946), and said:

> Mr. Justice Frankfurter's Colegrove opinion contended that Art. I, 4, of the Constitution had given Congress "exclusive authority" to protect the right of citizens to vote for Congressmen, but we made it clear in Baker that nothing in the language of that article gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury v. Madison*, 1 Cranch 137, in 1803. Cf. *Gibbons v. Ogden*, 9 Wheat. 1.

376 U.S. at 6-7 (footnotes omitted).

Surely, if the reference in Art. I, § 4 to the power of Congress does not immunize congressional redistricting from judicial enforcement of the law, neither does the reference to legislatures. While the *Wesberry* opinion was referring to the enforcement of the federal constitution, federal courts are not the exclusive guardians of that constitution. State courts also are obligated and entrusted to enforce it. *See, Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-44 (1816). When the Constitution and Art. I, § 4 was drafted, there were no lower federal courts. The task of judicial enforcement of the constitution was borne by the state courts. That being the case, Art. I, § 4 cannot be said to divest state courts of jurisdiction to enforce the law in matters of congressional redistricting and thereby leave the task

exclusively to federal courts.[7]

In canvassing the precedents, the District Court here found only three cases interpreting the relevant clause of Article I, § 4: *Davis v. Hildebrant*, 241 U.S. 565 (1916) (nullification of the legislature's congressional redistricting plan by application of a state constitutional provision allowing the people to disapprove any law through popular referendum does not violate Article I, § 4); *Smiley v. Holm*, 285 U.S. 355 (1932) (governor's veto of legislature's congressional redistricting plan does not violate Article I, § 4); and *Grills v. Branigin*, 284 F. Supp. 176, 178 (S.D. Ind.), *aff'd*, 391 U.S. 364 (1968) (Article I, § 4 does not permit a state board of elections to draw a congressional redistricting plan to displace that of the legislature). According to the District Court, "these three cases . . . have made clear that the reference to 'Legislature' in Article I, Section 4 is to the law-making body and *processes of the state*." App. 13a (emphasis added).

This, however, supports the exercise of state court authority rather than contradicts it. In most states, including

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[7] Although the state court complaint mentioned no specific provision of federal law, it asked the court "to insure enforcement of the laws" by adopting a plan if the legislature defaulted. Of course, the state courts were required to enforce both federal and state law. *See, Hathorn v. Lovorn*, 457 U.S. 255, 258, 269-70 (1982) (in a case where state court complaint raised only state law claim, this Court held that state courts have "the duty" to enforce federal law). If Art. 1, § 4 does not preclude state courts from enforcing federal law in this arena, nothing about it precludes them also from enforcing state law (so long as state law does not conflict with federal law). And with respect to Art. I, § 4, nothing suggests that the power to enforce the law is contingent upon whether the complaint specifically mentions federal law or not. As this Court pointed out when requiring in *Growe* that federal courts defer to state courts in these matters: "*Germano* . . . does not require that the federal and state-court complaints be identical; it instead *focuses on the nature of the relief being requested*: reapportionment of election districts." 507 U.S. at 35 (emphasis added), *citing, Scott v. Germano*.

Mississippi, the "processes of the state"authorize the courts to enforce the law through equitable remedies. Just as this Court held in *Davis* that the application of the state constitutional authority of the people of Ohio to nullify a legislative enactment did not countermand Art. I, § 4 when congressional redistricting was at issue, the application of the state constitutional and statutory authority of Mississippi's chancery courts over all matters in equity, Miss. Const. Art. 6, § 159, Miss. Code Ann. § 9-5-81, does not violate Art. I, § 4 in such a situation. And just as this Court held in *Smiley* that the gubernatorial veto generally applicable to legislative enactments can be exercised with respect to congressional redistricting without violating Art. I, § 4, so the equitable authority of courts to enforce the law as a general matter can be exercised with respect to congressional redistricting without transgressing that provision. In *Smiley*, this Court said that Art. I, § 4 does *not* "render[] inapplicable the conditions which attach to the making of state laws" such as, in that instance, the gubernatorial veto. 285 U.S. at 365. In Mississippi, as in most states, the "conditions which attach to the making of state laws" include the power of the courts to take the necessary steps to enforce the laws through equitable relief when, as here, the legislature leaves a gap.[8]

If anything, the situations in *Davis* and *Smiley* are more of an affront to Art. I, § 4 than what happened here. In those cases, a non-legislative entity nullified the legislature's congressional plan. Here, the state courts acted only when the legislature specifically declined to act. Surely, if Art. I, § 4 was

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[8] In *Grills*, when holding that the state election board could not draw congressional plans, the court said that the board does not "possess the legislative power . . . nor . . . judicial power under the Indiana constitution," 284 F. Supp. at 180. This reference to judicial power implies that the state courts can exercise equitable authority and draw such plans without violating Art. I, § 4.

not transgressed there, it was not violated here.

Because the District Court's decision so dramatically conflicts with this Court's decision in *Growe*, contravenes the understanding that most state courts have of their authority in the wake of *Growe*, leaves (if affirmed) most state courts without any authority in matters of congressional redistricting, and appears inconsistent with the decisions in *Davis* and *Smiley*, this Court should note probable jurisdiction.[9]

II. CONTRARY TO THE HOLDING OF THE DISTRICT COURT, THE STATE COURT PLAN WAS PRECLEARED WHEN THE ATTORNEY GENERAL DID NOT OBJECT TO IT WITHIN SIXTY DAYS OF ITS SUBMISSION.

Section 5 provides that when any covered state "enact[s] or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it may obtain the requisite federal preclearance "if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . ."

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[9] This appeal raises issues relating not only to Art. I, § 4, but also to Section 5 of the Voting Rights Act. Of course, the validity of the state court's plan depends on whether it ultimately is precleared under Section 5. The plan also is the subject of an appeal in the Supreme Court of Mississippi. But no matter how the preclearance process and the state court appeal are resolved, the Art. I, § 4 issue will remain alive. The federal injunction premised upon Art. I, § 4 prevents the state courts from implementing *any* plan, whether it is the existing state court plan or some alternative that those courts adopt in the future if the existing plan is not precleared or is vacated on appeal.

The December 26, 2001 preclearance submission listed three separate items for possible preclearance: (1) the December 21, 2001 Chancery Court order substantively adopting a new congressional redistricting plan, (2) the December 13 Mississippi Supreme Court ruling in *In Re Mauldin* that the chancery court had jurisdiction to hear the case and adopt a plan, and (3) the December 21 Chancery Court order "to the extent that it constitutes a departure from Miss. Code Ann. Section 23-15-1039." App. 227a-229a.[10]

The February 14 Department of Justice letter did not seek more information regarding the first change. "[T]he Department is not formally seeking additional information regarding the redistricting plan." App. 195a. Most of the questions relate to the second item. One question purportedly relates to the third, which involves Miss. Code Ann. § 23-15-1039, a statute providing that if the number of congressional representatives is decreased and the next election is held "before the districts shall have changed to conform to the new apportionment," representatives shall be chosen at-large. Although acknowledging that the DOJ "has not sought additional information regarding the redistricting plan," the District Court nevertheless extended the sixty day statutory review period because, it said, the latter two items involve a "newly asserted change in redistricting authority" that, if not

[10] After listing the first item submitted, which was the Chancery Court's "substantive[] adopt[ion of] a new congressional redistricting plan," the Mississippi Attorney General's office submitted the other two by listing "the following additional matters which *may* constitute a covered change . . . ." App. 227a (emphasis added). The submission also expressly reserved all objections as to whether the submission, "or any parts thereof," are subject to Section 5's preclearance requirements. *Id.* 225a. Also, contrary to the suggestion of the District Court, app. 97a-98a, the appellants did not conceded that anything other than the first of the three items listed above is a voting change subject to Section 5.

precleared, "render[] the plan itself a legal nullity under the Voting Rights Act." *Id.* 33a-34a n.3.

In the remainder of this document, we contend (a) the December 13 state supreme court ruling is not a voting change, (b) the December 13 Supreme Court order and December 21 Chancery Court order do not conflict with § 23-15-1039 and therefore do not alter the provisions or operation of that statute in a way that constitutes a voting change, and (c) even if one or both of the foregoing are voting changes, the information requested by DOJ on February 14 is unnecessary and irrelevant to the § 5 retrogression evaluation. If we are correct about points (a) and (b), the additional information requested does not relate to any voting changes, and the voting change that did occur — the redrawing of the lines — was precleared when the sixtieth day expired on February 25 without objection. If we are correct about point (c), it raises the question left open in *Georgia v. United States*, 411 U.S. 526 (1973) — whether a request for additional information that is "unnecessary or irrelevant to § 5 evaluation of the submitted reapportionment plan," *id.* at 540, extends the review period beyond the statutory sixty days. If the period was not extended, the state court plan has been precleared.

A. The December 13 Order of the Mississippi Supreme Court in *In Re Mauldin* Is Not a Voting Change.

The December 13 Mississippi Supreme Court's order in *In re Maudlin* confirming the Chancery Court's jurisdiction does not involve (to quote Section 5) the "enact[ment] or . . . administ[ration] [of] any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964."

All agree that the new districting plan adopted by the state courts must be precleared. This Court said as much in *Hathorn v. Lovorn*, 457 U.S. 255, 269-70 (1982), when it held — in

reviewing a Mississippi chancery court order implementing a new election scheme — that state courts must enforce Section 5 and insure preclearance of any voting changes they mandate. But the Court never suggested that preclearance also was required of the decision by the state courts to exercise jurisdiction in the first place.

In contending the December 13 decision constitutes a voting change, the District Court, App. 96a-97a, cited a 1932 Mississippi Supreme Court decision declining to adjudicate a congressional redistricting claim and saying, "courts of equity deal alone with civil and property rights and not with political rights." *Brumfield v. Brock*, 142 So. 745, 746 (Miss. 1932).[11] That case, like *Barnes v. Barnett*, 129 So. 2d 638, 641 (Miss. 1961), arose at a time when the "almost universal rule [was] that the apportionment . . . of congressional districts is a political question and not a judicial one." *Barnes*, 129 So. 2d at 641. As the Court said in *Barnes*, "the leading case so holding is *Colegrove v. Green*, 1946, 328 U.S. 549." 129 So. 2d at 641. But subsequent to *Barnes*, this Court overruled *Colegrove v. Green* in the landmark decision of *Baker v. Carr*, 369 U.S. 186 (1962). Afterwards, state courts in Mississippi, like courts throughout the land, began hearing redistricting cases involving all types of elected bodies. *See, e.g., Hathorn v. Lovorn*; *Carter v. Luke*, 399 So. 2d 1356 (Miss. 1981); *Brooks v. Hobbie*, 631 So. 2d 883, 885-86 (Ala. 1993) (overruling pre-*Baker* Alabama precedent and stating: "In light of *Baker v. Carr* and its progeny, it is not longer legitimate for a court to decline to enforce the right of every citizen to [an equal] vote"). But no one suggested that preclearance was

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[11] The District Court also intimated that the December 13 order constituted a voting change from the formula contained in Miss. Code Ann. § 23-15-1039. App. 96a-98a. The next section of this document explains that this is not a voting change.

required of the mere decision to exercise jurisdiction.

Indeed, if that sort of decision is a voting change, an entire legion of post-1964 ventures by state courts into the arena of voting rights in covered jurisdictions has violated Section 5. And the violations are ongoing. For example, prior to *Reynolds v. Sims*, 377 U.S. 533 (1964), the Fourteenth Amendment was widely considered not to require population equality among state legislative and local governmental districts and few, if any, state courts required it. And prior to 1965, the Voting Rights Act did not exist. Of course, after these developments, state courts began to uphold the one-person, one-vote rule and the Voting Rights Act in a variety of contexts. We are aware of no courts, however, that believed they had to obtain preclearance of the threshold decisions to hear the cases (as opposed to the actual changes ordered at the conclusion of the cases) and are aware of none that have done so.

But under the theory of the District Court here, preclearance was required before any of those state courts could apply these new principles of law and exercise jurisdiction over any type of claim they had not adjudicated prior to the November 1, 1964, which is the trigger date for Section 5. According to that theory, if a trial court exercises jurisdiction post-1964 in a one-person, one-vote case involving a county commission, in a situation where it has never done so before, it first must obtain preclearance of that exercise — independent of obtaining preclearance for any new election plan it adopts. Once the case goes on appeal, the state supreme court must obtain preclearance of any decision affirming the trial court's jurisdiction if it previously has not done so in an identical or at least similar situation. Apparently, the entire process must be repeated the next time a case arises in a slightly different context — say, city council elections rather than county commission elections. Indeed, under the District Court's holding, the preclearance path must be traversed anew every

time the state courts, acting in conformity with developments in the jurisprudence of voting rights, hear a case in a new context.[12]

Of course, as a general matter, voting changes may not be implemented until precleared. *Clark v. Roemer*, 500 U.S. 646, 652 (1991). If the assumption of jurisdiction in a new context is a voting change, a state court may believe it is required to submit the change to the DOJ, wait sixty days, wait another sixty days if the DOJ chooses to delay and ask the type of questions it asked here, and obtain DOJ approval before it even holds hearings or goes forward in the case. That sort of delay, is problematic in any case, but particularly in voting rights cases, which often involve what this Court in *Growe* described as "exigent circumstances." 507 U.S. at 35. Surely, Section 5 does not mandate such a cumbersome process.

If it did, the landscape would be littered with violations. As mentioned before, few state courts have obtained such preclearance. Under the District Court's holding, any remedies those courts ordered are unlawful because, even though the changes encompassed by the remedies were precleared, the underlying assumptions of jurisdiction were not.

Like most courts in most states, chancery courts in Mississippi long have held equitable authority. They have applied that authority in voting cases after *Baker v. Carr* to a greater degree than before. While any particular remedial order in such a case that changes the method of voting must be precleared, the mere decision to assume jurisdiction in the post-

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[12] For example, under the District Court's theory, a state court, confronting for the first time a case involving what this Court in *Shaw v. Reno*, 509 U.S. 630, 652 (1993) described as the "analytically distinct" claim raised there, would be required to obtain preclearance of the assumption of jurisdiction in such a case.

Baker v. Carr context is not a voting change. The December 13 ruling of the Supreme Court of Mississippi is not subject to Section 5 and preclearance is not required.

B. The Use of Districts Rather Than At-Large Elections in the State Court Plan Does Not Deviate From Miss. Code Ann. § 23-15-1039 and Is Not a Voting Change.

In addition to the numerous questions regarding chancery courts in Mississippi, the February 14 DOJ letter contains one question regarding the relationship between the state court's exercise of jurisdiction and Miss. Code Ann. § 23-15-1039. App. 193a-194a.[13] But neither the state court plan nor the exercise of state court jurisdiction conflicts with § 1039. The statute reads:

> Should an election of representatives in Congress occur after the number of representatives to which the state is entitled shall be changed, in consequence of a new apportionment being made by Congress, and *before the districts shall have changed to conform to the new apportionment*, representatives shall be chosen as follows: . . . if the number of representatives shall be diminished, then the whole number shall be chosen by the electors of the state at large.

(Emphasis added).

The statute says nothing about who can or should adopt redistricting plans. Moreover, it does not require at-large elections whenever the state loses a seat in congress. Instead, it purports to require at-large voting only when the state loses a seat *and* the next election is actually held "before the districts

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[13] After referring to the December 13 order, the letter said: "Please explain the state's view of the relationship between this change in procedure and Miss. Code Annot. 23-15-1039." App. 193a-194a.

have changed to conform to the new apportionment." In all other situations, Mississippi law requires that members of congress be elected "by districts." Miss. Code Ann. § 23-15-1033. Historically, they have been elected by districts.

Once the state court adopted a plan, the "districts [had] changed to conform to the new apportionment," and there was no need for at-large elections under the terms of the statute. *See, Carstens v. Lamm*, 543 F. Supp. 68, 77-78 (D. Colo. 1982) (holding that the federal at-large statute, 2 U.S.C. § 2a(c)(5) — which parallels the Mississippi statute — "provides emergency statutory relief" to be utilized only when a seat is lost and neither the legislature nor a court can devise a plan in time for the election). Because the state court adopted a four-district plan here, thus "chang[ing] [the districts] to conform to the new apportionment,"its action in no way conflicts with § 1039. There is no voting change with respect to that statute.

C. The DOJ Letter Requested Information That Is Unnecessary to the Evaluation Under Section 5 and the Request Therefore Does Not Extend or Restart the Sixty Day Review Period Prescribed by the Statute.

Even if these matters were voting changes, the information requested on the fiftieth day was unnecessary to the Section 5 retrogression evaluation. In *Georgia v. United States*, the Attorney General requested additional information two weeks after the initial submission. This Court upheld the application in that case of the DOJ regulation restarting the 60 day calendar upon the receipt of the information. In so doing, the Court noted: "There is no serious claim in this case that the additional information requested was unnecessary or irrelevant to § 5 evaluation of the submitted reapportionment plan." 411 U.S. at 540. The Court also said:

> The appellants contend that to allow the Attorney General to promulgate this regulation is to open the way to frivolous and repeated delays by the Justice Department of laws of vital concern to the covered States. No such conduct by the Attorney General is presented here, and by upholding the basic validity of the regulation we most assuredly do not prejudge any case in which such unwarranted administrative conduct may be shown.

Id. at 541 n.13.

Here, the information sought is irrelevant and unnecessary. The request for it is unwarranted and even frivolous. The delay in waiting until the fiftieth day to make the request is inexcusable. Restarting the sixty day period under these circumstances contravenes the statutory language of Section 5.

Under this Court's decisions, retrogression or an intent to retrogress are the only proper grounds for a Section 5 objection. *See, Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000). The information sought in the February 14 letter does not relate to these factors. The letter posed a hypothetical: "may a Chancery Court judge, selected in a county that is 95% white . . . impose a redistricting plan binding the entire state?" App. 194a. But Section 5 does not prohibit state courts from exercising jurisdiction in redistricting cases simply because each of the trial court judges is elected by a small percentage of the state's voters or because some judges are elected from districts with particular racial demographics. If it did, this Court's unanimous decision in *Growe v. Emison* would be inapplicable in those many Section 5 states where trial judges are elected and where the courts began hearing redistricting cases after Section 5 became effective in the mid-1960s.

The simple fact that a particular official among a designated group of officials could potentially adopt a retrogressive plan does not mean that any allocation of redistricting authority to that category of officials is itself retrogressive. Although a state court judge could adopt a

retrogressive plan, and the state supreme court could affirm it, the state legislature could do the same thing. The retrogression can be cured, however, by preclearance review of the plan itself. Questions about venue, alleged forum shopping, and the racial demographics of the judicial election districts are unnecessary to the Section 5 evaluation.[14] The DOJ focus should be on retrogression, not any unfounded concerns it chooses to raise about the operation of the state court system.[15]

Congress specifically provided in Section 5 that a voting change is precleared, and "may be enforced" by a state, if it "has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . ." There are no exceptions. Under the statute, the Attorney General may not suspend or restart the review period at will. The DOJ regulation, 28 C.F.R. §2137, allowing that period to begin anew when more information is requested is a means of insuring that the review period does not commence when the information submitted is so inadequate that the voting change cannot be said to have "been submitted . . . to the Attorney General." But where the additional information is unnecessary and even irrelevant to the Section 5 evaluation, nothing about that information demonstrates that the change has not "been submitted." Thus, the sixty day calendar may be started anew only if the omission of necessary information precludes the Section 5 evaluation to such an extent

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[14] As stated in the Mississippi Attorney General's response to the February 14 letter, the districts for electing chancery judges in Mississippi were precleared previously by the United States Attorney General, who was provided with their racial demographics at that time. App. 208a-209a.

[15] Moreover, this is not a transfer of the congressional redistricting power from one governmental entity (the legislature) to another (the courts). It instead involves the exercise of the equitable authority of the courts to adopt a plan when the legislature declines to exercise its authority.

that the voting change truly has not "been submitted" for review.

If it were otherwise, the Department of Justice could do as it has done here and seek unnecessary information about state court procedures when those courts adopt plans, or unnecessary information about legislative procedures when legislatures adopt them, and thereby delay preclearance in a situation where time is of the essence. The present case is a perfect example. Because of the Department's fiftieth day request for more information, it extended the statutory sixty-day review period a total of fifty-five days additional days (which includes the five days it took the Mississippi Attorney General to respond). This delay, along with the Department's unjustified failure to provide a prompt decision once the new information was received, prevented the enforcement of the plan adopted by the state authorities. That gave the federal court grounds, even apart from its questionable Article I, § 4 holding, to substitute its own plan for that of the state courts in the 2002 congressional election.[16] The delay is inexcusable, particularly in light of what this Court has described as "the reality that States must often redistrict in the most exigent circumstances . . . during the brief interval between completion of the decennial federal census and the primary season for the general elections in the next even-numbered year." *Growe v. Emison*, 507 U.S. at 35.

Congress provided a sixty day review period. The alleged voting changes were "submitted" on December 26. No one has identified any information that is so necessary to Section 5 evaluation that the purported changes cannot be said to have

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[16] Top DOJ officials knew this would be the impact of its delay. As the Assistant Attorney General for Civil Rights explained in his letter to the Chief Justice of Mississippi: "a wholly separate plan has been drafted by a federal court, which will be imposed if the Department does not very soon complete its review of the State's submission." App. 198a.

"been submitted." The District Court erred in extending the review period beyond the statutory sixty days. Given that no objection was interposed within sixty days of the submission of the state court redistricting plan, the plan has been precleared under Section 5.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, this Court should note probable jurisdiction and reverse the decision of the District Court.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,

Appellants,

v.

JOHN ROBERT SMITH; SHIRLEY HALL; and GENE WALKER,

and

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

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APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN ROBERT SMITH,
SHIRLEY HALL, AND
GENE WALKER — PLAINTIFFS

V.

CIVIL ACTION NO. 3:01-CV-855WS

ERIC CLARK, Secretary of State
of Mississippi; MIKE MOORE,
Attorney General for the State
of Mississippi; RONNIE MUSGROVE,
Governor of Mississippi; MISSISSIPPI
REPUBLICAN EXECUTIVE COMMITTEE;
AND MISSISSIPPI DEMOCRATIC
EXECUTIVE COMMITTEE — DEFENDANTS

BEATRICE BRANCH; RIMS BARBER;
L. C. DORSEY; DAVID RULE; JAMES
WOODARD; JOSEPH P. HUDSON; AND
ROBERT NORVEL — INTERVENORS

(Filed Feb. 26, 2002)

FINAL JUDGMENT

For the reasons stated in our opinions of February 19, 2002, and February 26, 2002, the defendants are hereby

enjoined from implementing the congressional redistricting plan adopted by the Chancery Court for the First Judicial District of Hinds County, Mississippi.

It is further ordered that the defendants are enjoined from implementing the former five-district congressional redistricting plan codified at Miss. Code Ann. § 25-15-1037.

It is further ordered that the defendants implement the congressional redistricting plan adopted by this court on its order of February 4, 2002, for conducting congressional primary and general elections for the State of Mississippi in 2002.

It is further ordered that the defendants shall use the congressional redistricting plan adopted by this court in its order of February 4, 2002, in all succeeding congressional primary and general elections for the State of Mississippi thereafter, until the State of Mississippi produces a constitutional congressional redistricting plan that is precleared in accordance with the procedures in Section 5 of the Voting Rights Act of 1965.

This court shall retain jurisdiction to implement, enforce, and amend this order as shall be necessary and just.

SO ORDERED, this, the 26th day of February, 2002.

/s/ E. Grady Jolly
E. GRADY JOLLY
United States Circuit Judge

/s/ Henry T. Wingate
HENRY T. WINGATE
United States District Judge

/s/ David C. Bramlette
DAVID C. BRAMLETTE
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN ROBERT SMITH,
SHIRLEY HALL, AND
GENE WALKER

PLAINTIFFS

V.

CIVIL ACTION NO. 3:01-CV-855WS

ERIC CLARK, Secretary of State
of Mississippi; MIKE MOORE,
Attorney General for the State
of Mississippi; RONNIE MUSGROVE,
Governor of Mississippi; MISSISSIPPI
REPUBLICAN EXECUTIVE COMMITTEE;
AND MISSISSIPPI DEMOCRATIC
EXECUTIVE COMMITTEE

DEFENDANTS

BEATRICE BRANCH; RIMS BARBER;
L. C. DORSEY; DAVID RULE; JAMES
WOODARD; JOSEPH P. HUDSON; AND
ROBERT NORVEL

INTERVENORS

(Filed Feb. 26, 2002)

OPINION

Today we have enjoined the defendants from implementing the congressional redistricting plan for the 2002 primary and general election that was adopted by the Hinds

County, Mississippi chancery court. We have ordered the defendants to conduct said congressional elections based on this court's plan issued on February 4, 2002. The basis for this injunction and order is reflected in our opinion of February 19, that is, the failure of the timely preclearance under § 5 of the Voting Rights Act of the Hinds County Chancery Court's plan. The opinion that follows, holding that the adoption of the state court's plan is unconstitutional, for the reason that it violates Article I, Section 4 of the United States Constitution, is this court's alternative holding, in the event that on appeal it is determined that we erred in our February 19 ruling. Furthermore, inasmuch as the Intervenors are presently seeking a stay of this court's orders, it is expedient and efficient that the Supreme Court have before it the case as a whole, instead of truncated sub-parts.[1]

I.

Our order entered on January 15, 2002, and our opinion filed on February 19, 2002, contain the facts and procedural history of the case before us, and we refer to those documents for the background of this case. As we noted in our opinion of February 19 (footnote 7 on page 43), there remain, however, other constitutional questions raised by the plaintiffs as to the chancery court plan, that have remained dormant awaiting preclearance. Primarily, the plaintiffs have contended from the beginning of this lawsuit that under the United States Constitution, a state court may not constitutionally redistrict a state for United States congressional elections; that under the

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[1] We have jurisdiction to address this question pursuant to 28 U.S.C. § 2284(a) ("[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts").

Constitution only the legislature can do so.[2]

The United States Constitution specifically provides in Article I, Section 4: "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the *Legislature* thereof." (Emphasis supplied.) No case – or any other authority – has ever expressed doubt that this constitutional provision applies to congressional redistricting. Consequently, this provision is indisputably applicable to congressional redistricting in the state of Mississippi in 2002. Because the issue is squarely presented by the plaintiffs, we cannot – nor can any other court or any other party to the case before us – sidestep this express provision of the United States Constitution. The specific question we must confront is: What is the practical meaning of this constitutional provision, and how it is to be applied here, where the state chancery court – not the legislature – prescribed the "Places and Manner of holding Elections for . . . Representatives . . . ."

In determining this question, we have looked to the plain meaning of the easily understood words of this section, and applied it to the facts before us. We have then looked to case authority, including authorities of the Supreme Court of the United States, the lower federal courts, and the state courts that have addressed this particular section of the Constitution. This review of authorities leads us to this conclusion: Although the constitutional provision may not require the state legislature itself to enact the congressional redistricting plan, the state authority that produces the redistricting plan must, in order to

[2] The plaintiffs also argue that their due process rights were violated in the state court proceeding, by, inter alia, an expedited schedule that denied an adequate opportunity to conduct discovery, which prevented meaningful participation in the Chancery Court trial.

comply with Article I, Section 4 of the United States Constitution, find the source of its power to redistrict in some act of the legislature.

This predicate conclusion raises the next question that we must resolve: whether any enactment of the Mississippi legislature grants to the chancery court the power to redistrict the State of Mississippi for congressional elections. We find no such statute. Furthermore, no case of the Mississippi Supreme Court has ever indicated there is such a statute. We thus come to the final conclusion that the redistricting plan for congressional elections in 2002 produced by the Hinds County Chancery Court transgresses Article I, Section 4 of the United States Constitution, is therefore unconstitutional, and is consequently a nullity. We order it enjoined and direct that the said 2002 elections be conducted on the basis of the plan described in and attached to our February 4, 2002 order.

II. The Meaning of the Term "Legislature"

We turn now to investigate and resolve the meaning of the term "Legislature" as used in Article I, Section 4, to consider whether the chancery court can fall within the meaning of that term and to provide the appropriate remedy.

A. The Constitutional Clause

To begin, we turn our attention specifically to the words of Article I, Section 4: Reviewing the plain language, the provision provides that the "Times, Places and Manner of holding Elections for Senators and Representatives shall be

prescribed in each state by the Legislature thereof."[3] Applying these words to the facts before us, everyone agrees that the legislature has not enacted a redistricting plan. Instead of the legislature, the chancery court has chosen the "Places and Manner" of conducting the congressional elections in Mississippi. It would surely seem, on the basis of the plain constitutional language, that the chancery court's order implementing its plan constitutes a violation of Article I, Section 4. But, the answer is not quite so simple. We therefore turn now to consider the cases that have considered the meaning of "Legislature."

B. Cases Considering the Term "Legislature"

Only a few cases have construed this constitutional term. One of the earliest Supreme Court cases is *Davis v. Hildebrant*, 241 U.S. 565, 566 (1916). There, the constitution of the State of Ohio was amended in 1912 to vest the legislative power not only in the general assembly, but also in the people by way of popular referendum and initiative.[4] Thus, the people could

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[3] The rest of the clause reads: "but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

[4] The Ohio Constitution provides, in relevant part:

> The legislative power of the state shall be vested in a General Assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided.

disapprove, by popular referendum, any law passed by the General Assembly. The General Assembly passed a congressional redistricting plan, which then was disapproved by referendum. In 1911, Congress had passed a Reapportionment Act, which allowed states which had the same or an increased number of congressional representatives to redistrict "in the manner provided by the laws thereof,"[5] pursuant to Congress's authority under Article I, Section 4. A suit was brought in the Ohio Supreme Court, arguing that the referendum power was not validly part of the legislative power of the state and that the use of the referendum in this case

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Ohio Const. Art. II, § 1.

[5] Specifically, Section 4 of the Act provided:

> That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act . . . .

Apportionment Act of Aug. 8, 1911, c. 5, § 4, 37 Stat. 13, 14. This section expired by its own limitation upon the enactment of the Reapportionment Act of June 18, 1929, c. 28, § 22, 46 Stat. 21, codified at 2 U.S.C. § 2a. The current § 2a provides methods for electing representatives when there has been a change in the number of representatives allotted to the state "[u]ntil a State is redistricted in the manner provided by the law thereof . . . ." 2 U.S.C. § 2(a)(c). This plainly implies that states can redistrict according to the "laws thereof." Laws can only be enacted by the legislature. This is in accord with the power granted to the legislature by Article I, Section 4. Of course, if there were any conflict between a congressional act and the Constitution, the Constitution would necessarily prevail.

violated Article I, Section 4. The Supreme Court of Ohio upheld the referendum procedure, noting that under the reserved powers in the Tenth Amendment to the United States Constitution, the people could determine the "character of [their] Legislature," and that "by the adoption of the amendment of 1912 [to the Ohio constitution] the people expressly limited this legislative power by reserving to themselves the power to reject any law by means of a popular referendum." *Davis v. Hildebrant*, 94 Ohio St. 154, 161-62 (Ohio 1916). The Supreme Court affirmed the holding of the Ohio Supreme Court, finding that the referendum provision did not violate state or federal law, or Article I, Section 4. *Davis*, 241 U.S. at 569-70. The Court stated that "so far as the state had the power to do it, the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power." *Id.* at 568. As to the Reapportionment Act of 1911's provision for reapportionment according to the "laws" of a state, the Court held that "by inserting a clause plainly intended to provide that where, by the state Constitution and laws, the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law." *Id.* The Court further held that including the referendum within the state legislative power did not violate Article I, Section 4, as Section 4 allows Congress to make regulations for the choosing of Representatives, and Congress had expressly permitted states to reapportion according to the laws of the state. *Id.* at 569. In short, because the referendum invalidating the congressional districts was derived from the legislative power of the state constitution, it comported with the requirements of Article I, Section 4. *Davis*, however, demonstrates some flexibility in Article I, Section 4, because it suggests that the term "Legislature" is not confined to the state legislature as an institutional body, but

also encompasses the initiative, authorized by the state constitution, as a source of legislative power under state law.[6]

In *Smiley v. Holm*, 285 U.S. 355, 361 (1932), the Minnesota legislature had redistricted the state's congressional seats and the governor had vetoed the plan, but the Minnesota House of Representatives directed the Secretary of State to implement the plan despite the fact that the legislature had not overridden the governor's veto, as required by Minnesota law. The plaintiff in *Smiley* alleged that the governor's veto had invalidated the plan. The issue presented was whether a governor could veto a congressional redistricting plan given the reference in Article I, Section 4 to the "Legislature" only. The court found that the reference to the "Legislature" of a state in Article I, Section 4 did not invest the Legislature with "a particular authority . . . the definition of which imports a function different from that of lawgiver . . . ." *Id.* at 365.

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[6] Although Mississippi allows voters to approve constitutional amendments by referendum, *see* Miss. Code Ann. § 23-15-369, and to propose constitutional amendments by initiative, *see* Miss. Code Ann. § 23-17-1, *et seq.*, this is not at issue in the case before us. Other than these provisions, the legislative power is vested by the constitution exclusively in the legislature. The Mississippi Constitution, Article I, § 1 provides that: "The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another." The constitution further limits the exercise of each power to the branch in which it is vested: "No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments." Miss. Const. Art. 1, § 2. The legislative power is vested exclusively in a legislature: "The legislative power of this state shall be vested in a legislature which shall consist of a senate and a house of representatives." Miss. Const. Art. 4, § 33.

Rather, "the exercise of the authority must be in accordance with the method the state has prescribed for legislative enactments." *Id.* at 367. Therefore, because the laws of Minnesota allowed for a gubernatorial veto of legislative enactments, it was proper for the Governor to veto the redistricting legislation. *Id.* at 369. *Smiley* concluded:

> It clearly follows that there is nothing in article I, [§] 4, which precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power.

Id. at 372-73. *Smiley* indicates that congressional redistricting must be done by a state in the same manner that other legislative enactments are implemented. *See also Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982) ("Congressional redistricting is a law-making function subject to the state's constitutional procedures."; citing *Smiley*). These two cases, *Davis* and *Smiley*, seem to constitute the complete list of Supreme Court cases that provide some definition for the term "Legislature."

There is, however, one lower federal court case that has addressed the question, *Grills v. Branigin*, 284 F. Supp. 176, 178 (S.D. Ind.), *aff'd*, 391 U.S. 364 (1968). This case involved a challenge to several statutes passed by the Indiana General Assembly reapportioning the state's congressional districts. One of the plaintiffs requested that the defendants, the members of the State Election Board of Indiana, be authorized to reapportion the congressional districts. The court denied this

request, noting:

> Article I, Section 4, Clause 1 of the United States Constitution clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts. This power is granted to the Indiana General Assembly and the Election Board does not possess the legislative power under the Indiana Constitution nor does it possess judicial power under the Indiana Constitution. In the case of *Smiley v. Holm* [] it was held that Article I, Section 4, Clause 1 of the United States Constitution's reference to the legislature of the several states required complete legislative treatment of a Districting Act which included the approval of the Governor.

Id. at 180. This case indicates that there must be some delegation of legislative authority, delegated by a legislative enactment of some sort, to draw congressional districts.

In sum, these three cases – the only ones that we have found that are helpful in defining the term "Legislature" – have made clear that the reference to "Legislature" in Article I, Section 4 is to the law-making body and processes of the state. These cases suggest that congressional redistricting must be done within the perimeters of the legislative processes, whether the redistricting is done by the legislature itself or pursuant to the valid delegation of legislative power. We have found no

cases that support a contrary conclusion.[7]

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[7] While we recognize that there have been a number of cases in which state courts have exercised the power to redistrict congressional seats, none of these cases has addressed the Article I, Section 4 question.

In California, on two occasions the Supreme Court of the state has reapportioned congressional districts. *Legislature v. Reinecke*, 10 Cal. 3d 396, 401 (Cal. 1973) (In Bank); *Wilson v. Eu*, 1 Cal. 4th 707 (Cal. 1992) (In Bank). In both cases, the California Supreme Court acted under its original mandate jurisdiction, as granted to the court in the state constitution, which of course provides a source of law for the state. *See* Cal. Const. Art. VI, § 10. The Article I, Section 4 issue was not raised.

In New York, although the New York Supreme Court, Kings County, drew a congressional redistricting plan for the state after the Legislature failed to do so, this plan subsequently was adopted by the legislature and then precleared by the Justice Department. *See Reid v. Marino*, Index No. 9567-92 (N.Y. Sup. Ct., Kings Co. 1992); *Puerto Rican Legal Defense & Education Fund v. Gantt*, 796 F. Supp. 677 (E.D.N.Y.), *vacated and dismissed as moot, Gantt v. Skelos*, 506 U.S. 801 (1992); *Puerto Rican Legal Defense & Education Fund v. Gantt*, 796 F. Supp. 681, 697-98 (E.D.N.Y. 1992); *Puerto Rican Legal Defense and Education Fund v. Gantt*, 796 F. Supp. 698, 699 (E.D.N.Y. 1992). The Article I, Section 4 issue was not raised.

In Texas, the Legislature failed to adopt a congressional reapportionment plan during its 2001 session, and the Texas Supreme Court stated that "[w]hen the Legislature does not act, citizens may sue and, then, it is the judiciary's role to determine the appropriate redistricting plan." *Perry v. Del Rio*, 2001 WL 1285081, *5 (Tex. Oct. 19, 2001). However, the Texas Supreme Court rejected the plan adopted by the trial court in that case, and a federal three-judge panel proceeded to trial and implemented its own redistricting plan. *See Balderas v. Texas*, No. 6:01-CV 158 (E.D. Tex. Nov. 14, 2001). Again, the Article I, Section 4 issue was not raised.

Finally, the New Jersey Supreme Court ordered a minor change in a congressional redistricting statute adopted by the New Jersey Legislature in order to reduce the population disparity among districts from 851 people to thirteen people. *See Koziol v. Burkhardt*, 51 N.J. 412, 416-17 (1968). The

C. Growe v. Emison

The Intervenors understandably rely on *Growe v. Emison*, 507 U.S. 25 (1993) and argue that it trumps all cases we have discussed respecting Article I, Section 4 in redistricting matters. At the outset, we should note our agreement with the Intervenors that *Growe* seems to stand for the proposition that the role of state courts in redistricting, generally, must be fully respected by the federal courts. We should further note that if *Growe* stood alone as the authority on the issue before us – that is, if we could disregard Article I, Section 4 and the cases we have referred to earlier – we would dismiss the plaintiffs' claim forthwith. However, we cannot ignore the Constitution and other Supreme Court authority, so we turn now to examine *Growe* and to determine if, indeed, it is contrary to or requires us to disregard our earlier conclusion that there must be a source of legislative authority for congressional redistricting.

In *Growe*, a number of plaintiffs filed suit in state court, challenging the existing *legislative and congressional* districts in Minnesota under the 14th Amendment to the United States Constitution and the Minnesota Constitution Article 4, Section 2, i.e., the one person-one vote principle, in the light of the new census. The parties stipulated that the existing districts were unconstitutional, and the Minnesota Supreme Court appointed a Special Redistricting Panel, consisting of one appellate judge

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court noted that its practice ordinarily was to leave such changes to the legislature, but because the case was heard by the court on April 2nd, decided on April 3rd, and "the election statute requires administrative action by April 5 and since the required alterations would not depart from the basic legislative plan, it seems fitting for the Court to direct the necessary changes, subject of course to the power of the Legislature to adopt another plan consonant with constitutional principles." *Id.* at 417. The Article I, Section 4 issue was not discussed.

and two district judges, to preside over the case. *Id.* at 28. The Minnesota Supreme Court did so because "[t]he Chief Justice has authority to appoint a special redistricting panel under Minn. Stat. §§ 2.724 and 480.16."[8] *Cotlow v. Growe*, 622 N.W.2d 561, 562 (Minn. 2001).[9] Meanwhile, two suits were filed in federal court and a federal three-judge panel was convened to hear the consolidated cases. *Growe*, 507 U.S. at 28. After a period of deferral to allow the state legislature to act, the federal court stayed the proceedings in state court, which had developed a redistricting plan, proceedings and ultimately adopted its own federal plan for state legislative and for congressional redistricting plans. *Id.* at 30-31. The Supreme Court held that the district court erred in not deferring

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[8] Minn. Stat. § 2.724 provides in relevant part: "When public convenience and necessity require it, the chief justice of the supreme court may assign any judge of any court to serve and discharge the duties of judge of any court in a judicial district not that judge's own at such times as the chief justice may determine." Minn. Stat. § 480.16 provides:

> The chief justice shall consider all recommendations of the court administrator for the assignment of judges, and has discretionary authority to direct any judge whose calendar, in the judgment of the chief justice, will permit, to hold court in any county or district where need therefore exists, to the end that the courts of this state shall function with maximum efficiency, and that the work of other courts shall be equitably distributed. The supreme court may provide by rule for the enforcement of this section and section 480.17.

[9] This case involved a motion to reopen the original *Cotlow* case, which was the case pending before the three-judge state court when the *Growe* case was brought in federal court and decided.

to the state court's timely consideration of legislative and congressional reapportionment. *Id.* at 36-37.

The Supreme Court in *Growe* indicated that state courts have a significant role in redistricting. *Growe* declares:

> In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself . . . [T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts. See U.S. Const., Art. I, § 2. 'We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.' *Chapman v. Meier*, 420 U.S. 1, 27 (1975).

507 U.S. at 34. To place the holding of the Supreme Court in context, we start with the pivotal observation that the Article I, Section 4 issue was not discussed or even raised in *Growe* because – unlike this case – the parties did not dispute the constitutional jurisdiction of the state court. *See id.* at 32. (*See also Texas v. Cobb*, 532 U.S. 162, 168 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue.")) Without objection from

any party, the Minnesota Supreme Court relied on its specific authority under the statutes of Minnesota to assign judges to hear cases "where need therefor exists," and appointed a three-judge panel. We also note that *Chapman*, relied on by the Court in *Growe*, involved only the reapportionment of the state legislature, not congressional districts, and therefore no Article I, Section 4 question could have been implicated.

It is certainly true that the Supreme Court chastised the federal court in *Growe* for dismissing the role of the state court in the redistricting process. Nevertheless, we cannot conclude that *Growe* stands for the proposition that we may disregard Article I, Section 4, or these previously cited Supreme Court authorities. This conclusion is undergirded by the facts that: Article I, Section 4 was not raised in *Growe*; the earlier Supreme Court cases addressing Article I, § 4 were not referred to, much less overruled, *see United States v. Hatter*, 532 U.S. 557, 567 (2001) ("it is [the Supreme] Court's prerogative alone to overrule one of its precedents") (internal quotation marks and citations omitted)); the *Chapman* case relied upon in *Growe* involved only a state court redistricting the state legislature, not congressional redistricting; and, finally, there was some, albeit tenuous, legislative authority for the Minnesota Supreme Court's action in *Growe*.

Thus, based on our understanding of the constitutional provision in the light of its plain language and the case authority when considered as a whole, we hold: Article I, § 4 requires a state to adopt a congressional redistricting plan in a manner that comports with legislative authority as defined by state law.

III. Authority of the Chancery Court

In the case before us, we can find no legislative act upon which to base the chancery court's authority to act in congressional redistricting. Unlike in Minnesota and California, the Mississippi Supreme Court has appellate jurisdiction only.[10] While the Mississippi legislature has empowered other state bodies to redistrict a number of *state* electoral districts, it has not authorized any other state body, including the chancery court, to redistrict *congressional* districts. For example, the state constitution grants the Mississippi Supreme Court the authority to redistrict circuit and chancery court districts in the State of Mississippi when the legislature fails to do so. *See* Miss. Const. Art. 6, § 152. In another instance, the legislature has provided that if it is unsuccessful in redistricting state legislative districts, a five-member commission will redistrict the state. Miss. Const. Art. 13, § 254. This commission consists of the chief justice of the Mississippi Supreme Court as chairman, and the attorney general, secretary of state, speaker of the house of representatives, and president pro tempore of the senate. *Id.* There is no similar legislative grant for redistricting congressional districts. Further, there is no statutory authority in Mississippi for Supreme Court judges to assign individual judges to hear cases when the public necessity requires, unlike

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[10] The Constitution of the State of Mississippi provides:

> The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals and shall exercise no jurisdiction on matters other than those specifically provided by this Constitution or by general law.

Miss. Const. Art. 6, § 146. *See also* Miss. Code Ann.§ 9-3-9.

in Minnesota.

The intervenors argue that the Mississippi chancery courts have jurisdiction over "[a]ll matters in equity," Miss. Const. Art. 6, § 159, and that this constitutes the authority for the Hinds County Chancery Court to redistrict the state for congressional elections. However, the Mississippi Supreme Court has specifically held, in the past, that the state chancery courts have no jurisdiction over a complaint that sought to enjoin congressional elections on the ground that a congressional redistricting statute adopted by the state legislature violated a federal statute which required congressional districts to contain "as nearly as practicable an equal number of inhabitants." *See Brumfield v. Brock*, 142 So. 745, 746 (Miss. 1932). "By a long line of decisions this court has held that courts of equity deal alone with civil and property rights and not with political rights." *Id.* In 1994, the Mississippi Supreme Court stated: "Chancery courts in this state do not have the jurisdiction to enjoin elections or to otherwise interfere with political and electoral matters which are not within the traditional reach of equity jurisdiction." *In re McMillin*, 642 So. 2d 1336, 1339 (Miss. 1994).

It is true, of course, that in *In re Mauldin*, No. 2001-M-01891 (Miss. Sup. Ct., Dec. 13, 2001), the Mississippi Supreme Court held that this Hinds County Chancery Court did have jurisdiction over the state lawsuit brought in the instant case.[11] The court did not provide any basis for its holding, did

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[11] The holding of the Mississippi Supreme Court stated, in its entirety:

> After due consideration the Court finds that the Hinds County Chancery Court has jurisdiction of this matter. The Court further finds that the request to dismiss the Plaintiffs'

not refer to its earlier cases to the contrary, and did not point to any legislative authority that authorized the chancery court to act.[12]

> Amended Complaint is denied. The Court further finds that the request to transfer this cause to circuit court is denied, as is the request for stay of the December 14, 2001, trial date. Any congressional redistricting plan adopted by the chancery court in cause no. G-2001-1777 W/4 will remain in effect, subject to any congressional redistricting plan which may be timely adopted by the Legislature.

This language could be interpreted to suggest that the Mississippi Supreme Court intended that the State's congressional districts should be reapportioned by a single chancery judge with no appellate review. Although an appeal of the Chancery Court's judgment has been filed, there is no indication when and if the court will consider the merits of the appeal.

[12] The Intervenors argue that *Adams County Election Comm'n v. Sanders*, 586 So. 2d 829 (Miss. 1991), gave the chancery court authority to redistrict congressional seats. However, *Adams County* only involved a request for an injunction against the County Election Commission, preventing it from conducting the primary and general elections for the Adams County Board of Supervisors. The chancery court issued the injunction, but did not engage in the drawing of districts on its own. Further, *Adams County* did not involve congressional districts, which are governed by Article I, Section 4, but only county board of supervisors districts. Additionally, the Mississippi Supreme Court recognized "that state courts have concurrent jurisdiction with the federal courts to decide whether § 5 of the Voting Rights Act applies to contemplated changes in election procedures," but did not decide "which state court, chancery or circuit, should decide such questions. . . . " *Id.* at 831.

Deciding whether an official must submit a voting change for preclearance is to be distinguished from the actual drawing of congressional districts. The Mississippi Supreme Court has stated that a court "can direct an official or commission to perform its official duty or to perform a

In sum, we can only conclude that the requirements of Article I, Section 4 were not met in this case, as there has been no indication that the chancery court had any legislative authority to draw the state's congressional districts. Indeed, the Mississippi Supreme Court has specifically held that such matters do *not* fall within the equity jurisdiction of the chancery courts. Therefore, irrespective of whether the chancery court plan is precleared, the chancery court plan cannot be implemented by the State of Mississippi, because the chancery court's adoption of it, in the absence of any state legislative authority, violates Article I, Section 4.[13]

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ministerial act, but it cannot project itself into the discretionary function of the official or the commission. Stated differently, it can direct action to be taken, but it cannot direct the outcome of the mandated function." *In re Wilbourn*, 590 So. 2d 1381, 1385 (Miss 1991) (quotation omitted). Based on *Wilbourn*, the Mississippi Supreme Court has allowed a circuit court to enjoin the carrying out of city elections under an illegal election law "until the City could amend its Charter in compliance with Miss. Code. Ann. § 21-17-9 (1990)." *City of Grenada v. Harrelson*, 725 So. 2d 770, 773 (Miss. 1998). Again, this clearly is not the same issue as whether a chancery court judge has the power to draw congressional districts for the entire state.

[13] Although a legislature may be able to delegate its powers granted under Article I, Section 4, this is not the factual circumstance presented to us. *See, e.g., Brady v. The New Jersey Redistricting Comm.*, 131 N.J. 594 (N.J. 1992). The New Jersey Supreme Court upheld an Act, passed by the Legislature and signed into law by the Governor, which created the New Jersey Redistricting Commission, with responsibility for establishing the state's congressional districts. *Id.* at 601-02. The Act allowed the Republican and Democratic parties to each appoint six commissioners to the Commission, and allowed the twelve commissioners to select one independent member to serve as the Chairman of the commission and to vote only in the event of a tie. The Act provided the Commission with specific guidelines for drawing congressional districits, i.e., equality in population, preservation of minority communities, contiguity, and preservation of continuity in congressional districts. *Id.* at 602-03. The

IV. Remedy

The precise question of an appropriate remedy for an Article I, Section 4 violation has not been addressed before. However, under established principles, this court has the authority to order the use of its own congressional redistricting plan in place of a state's plan if we find a constitutional violation in the state's plan. *See Hastert v. State Board of Elections*, 777 F. Supp. 634, 661 (N.D. Ill. 1991) (finding Illinois's existing congressional districting plan unconstitutional and therefore "null and void," and ordering that the court's redistricting plan be used in the upcoming congressional election); *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 934 (W.D. Mo.) (declaring state's existing congressional apportionment plan unconstitutional and ordering that the redistricting plan crafted by the court be used "until a timely new congressional redistricting act enacted by the State of Missouri takes effect"), *aff'd*, 456 U.S. 966 (1982); *Carstens v. Lamm*, 543 F. Supp. 68, 100 (D. Colo. 1982) (declaring existing state congressional districting plan unconstitutional, ordering use of plan developed by federal three-judge district court, and ordering defendant Colorado Secretary of State to be

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Court found that the Commission did not violate Article I, Section 4 because it involved a valid delegation of legislative powers to a "specialized form of administrative agency," the discretion of which was "hemmed in by standards sufficiently definitive to guide its exercise." *Id.* at 607-08 (citations and quotation marks omitted). The court also noted that the Act was passed pursuant to the lawmaking process of the state, i.e. was passed by both houses of the legislature and signed by the Governor. *Id.* at 610. We note that the Act provided it would expire on January 1, 2001. *See* 1991 N.J. Laws, c. 510, § 12.

governed by and comply with the court's redistricting plan).[14]

V. Conclusion

In the light of the foregoing analysis, the congressional redistricting plan adopted by the chancery court is declared unconstitutional, and the state's implementation of the chancery court plan is enjoined, as per our Final Judgment entered today.

SO ORDERED, this, the 26th day of February, 2002.

/s/ E. Grady Jolly
E. GRADY JOLLY
United States Circuit Judge

/s/ Henry T. Wingate
HENRY T. WINGATE
United States District Judge

/s/ David C. Bramlette
DAVID C. BRAMLETTE
United States District Judge

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[14] The plaintiffs also argue that their due process rights were violated by the state court proceeding. However, because the plaintiffs were not parties to the state court proceeding and they are attempting to raise the rights of third parties, they do not have standing to raise this issue in this court. *See U.S. Dept. of Labor v. Triplett*, 494 U.S. 715, 720 (1990) ("[A] litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. This is generally so even when the very same allegedly illegal act that affects the litigant also affects a third party.") (citations and quotation marks omitted).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN ROBERT SMITH,
SHIRLEY HALL, AND
GENE WALKER — PLAINTIFFS

V. — CIVIL ACTION NO. 3:01-CV-855WS

ERIC CLARK, Secretary of State
of Mississippi; MIKE MOORE,
Attorney General for the State
of Mississippi; RONNIE MUSGROVE,
Governor of Mississippi; MISSISSIPPI
REPUBLICAN EXECUTIVE COMMITTEE;
AND MISSISSIPPI DEMOCRATIC
EXECUTIVE COMMITTEE — DEFENDANTS

BEATRICE BRANCH; RIMS BARBER;
L. C. DORSEY; DAVID RULE; JAMES
WOODARD; JOSEPH P. HUDSON;
AND ROBERT NORVEL — INTERVENORS

(Filed Feb. 19, 2002)

OPINION

This opinion follows the trial in this matter on January 28 and 29, 2002, and our order of February 4, 2002, which attached the proposed congressional redistricting plan that we

had drafted. We stated in that order that we proposed to implement that plan, absent timely preclearance by the Department of Justice of the plan adopted by the Hinds County Chancery Court. We directed the parties to show cause why this court's plan failed to meet constitutional and federal standards and should not be implemented. The Intervenors filed certain objections. For the reasons that follow, we overrule the Intervenors' objections to this court's plan. Furthermore, we make clear that we will enjoin the implementation of the Chancery Court plan for the 2002 congressional elections, and order that the elections in 2002 be conducted in accordance with this court's plan of February 4, 2002, if the Chancery Court plan has not been precleared on or before the close of business on February 25, 2002.[1]

I. Facts and Procedural History

The facts and procedural history are set out in our order of January 15, 2002. In that order, we concluded that it was necessary for us to assert our jurisdiction in order to ensure that an enforceable congressional redistricting plan was in place prior to the March 1, 2002 deadline for candidates to qualify for the 2002 congressional elections, because it appeared uncertain whether the State authorities would have a redistricting plan in place prior to that deadline.

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[1]The plan adopted by the Chancery Court cannot be implemented unless the Department of Justice "has interposed no objection within a 60-day period following submission." 28 C.F.R. § 51.1(2). The initial 60-day period was to have expired on February 25. On February 14, the Department of Justice requested additional information from State authorities. A new 60-day period will begin to run upon receipt of the requested information. 28 C.F.R. § 51.37. It is still possible that the Chancery Court plan will be precleared by February 25.

On January 16, we conducted a scheduling conference. Thereafter, we entered a scheduling order allowing the parties an opportunity to conduct discovery and setting the matter for trial on January 28 and 29, 2002. Counsel for the Mississippi Democratic Executive Committee advised this court that his client adopted the position taken by the Intervenors. The Mississippi Republican Executive Committee was aligned with the Plaintiffs.

At trial, the Plaintiffs presented nine plans and called seven witnesses. The Intervenors presented two plans and called three witnesses. In addition, the record of the proceedings conducted in the Chancery Court, including the trial transcript and exhibits, was made a part of the record in this federal proceeding.

The Intervenors submitted a post-trial brief in which they contended that, even if the plan adopted by the Chancery Court is not precleared prior to the March 1 qualifying deadline, we nevertheless must defer to state policy and use the state court plan as a temporary plan for the 2002 congressional elections. Alternatively, the Intervenors urged us to utilize Branch Plan 2B, described *infra*, as an interim court-ordered plan. In the further alternative, the Intervenors urged us to postpone the qualifying deadline to await a preclearance decision. Finally, the Intervenors argued that, if this court drew its own plan, it should attempt to draw the third district with a higher percentage of black voting age population than that reflected in the plans submitted by the Plaintiffs.

After considering these arguments of counsel and the evidence presented at trial, we drafted our own plan. We concluded that none of the plans submitted by the parties fully comported with the objectives and criteria that should be

incorporated in a judicially approved redistricting plan. We considered that the Intervenors had offered little evidence that their plans address any of the factors that must be considered by a federal court in congressional redistricting. In reviewing the plans offered by the Intervenors, we took into account that they were admittedly drawn with partisan political objectives in mind, and, as a result, compactness of districts was not a factor. With respect to the plans offered by the Plaintiffs, although the testimony indicated that they had taken into account some of the relevant neutral factors, we found that each of them had various flaws. We concluded that the process would be shortened and simplified by drafting and perfecting our own plan, and that is what we did.

On February 4, we entered an order attaching our plan. Our order stated that we proposed to implement that plan absent the timely preclearance of the state court plan. We directed the parties to show cause by written objections, why this court's redistricting plan, if implemented, would not satisfy all state and federal statutory and constitutional requirements; and to make any other critical comments and suggestions with respect to the plan that the parties deemed appropriate.

On February 14, the Department of Justice requested additional information from State authorities, and advised that a new 60-day period would begin to run upon receipt of the requested information.

We now address the parties' objections and comments regarding our plan, and further explain the factors we considered, and how we applied them, in drafting our plan.

II. Objections and Comments of the Parties

A. Plaintiffs' Comments

The Plaintiffs and the Mississippi Republican Executive Committee had no objections as such to our plan. They did, however, comment on our analysis of the plan, requesting an explanation of the legal significance of our decision to consider, as a secondary factor, the effort to include as much as possible of former districts 3 and 4 in the new District 3. We have done so in the analysis of the factors we considered, and how we applied them, *infra*.

The Plaintiffs and the Mississippi Republican Executive Committee also commented that our February 4 order did not explain what we meant by "the timely preclearance of the redistricting plan adopted by the State Chancery Court."

The Plaintiffs also assert that the plans they submitted satisfy all constitutional and statutory criteria and can be defended on neutral redistricting principles. The Plaintiffs presented four basic plans, as well as modified versions of each of them. After studying each of the Plaintiffs' plans and after considering all neutral criteria for drafting congressional redistricting plans, we found various flaws in each, including: the fragmentation of communities of interest, especially the community of interest represented by southwest Mississippi; compactness concerns; retrogression concerns; unnecessary outdistricting of one of the incumbents; unnecessary division of municipalities outside the City of Jackson; and unnecessary splits in voting precincts.

We now turn to address the objections of the Intervenors.

B. Intervenors' Objections and Comments

The Intervenors object to our plan on many grounds, most of which were raised prior to trial and in their post-trial brief. We will address each of those objections separately, in the order in which they were presented to us.

1. Adoption of Chancery Court Plan

The Intervenors contend that the plan adopted by the Chancery Court reflects state policy, and that we should defer to that plan. They make this argument even though the Chancery Court plan is not effective as law because it has not been precleared. In support, the Intervenors rely on *Upham v. Seamon*, 456 U.S. 37 (1982); *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982); *Burton v. Hobbie*, 543 F. Supp. 235 (M.D. Ala.), *aff'd*, 459 U.S. 961 (1982); and *Burton v. Hobbie*, 561 F. Supp. 1029, 1034 (M.D. Ala. 1983). In *Upham*, the Supreme Court stated:

> [W]henever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor intrude upon state policy any more than necessary.

Id. at 41-42 (internal quotation marks and citation omitted); *see also White v. Weiser*, 412 U.S. 783, 797 (1973) (the only limits

on judicial deference to state apportionment policy are the substantive constitutional and statutory standards to which such state plans are subject). At issue in *Upham* was a congressional redistricting plan that had been enacted by a state legislature. Although the United States Attorney General had objected to only part of that plan, the three-judge federal court disregarded not only the part of the plan to which the Attorney General had objected, but also parts of the plan to which no objection had been lodged. The Supreme Court held that a district court has no authority to disregard those portions of a state plan which have been approved by the Attorney General under § 5 of the Voting Rights Act. *Id.* at 43.

Terrazas addressed legislative redistricting plans for the Texas Senate and House of Representatives that had been adopted by the Texas Legislative Redistricting Board. The plans had been submitted to the United States Department of Justice, which had objected to parts of the plans and had approved the remaining parts. Under those circumstances, the court deferred to the state plan, except as to the portions of it that were objected to by the Department of Justice. *Id.* at 528. Similarly, a legislative plan was at issue in the *Burton* decisions. Under those circumstances, and consistent with *Upham*, *White*, and *Terrazas*, the Alabama district court ordered the implementation of the legislature's plan, with modification to one of the counties. 543 F. Supp. at 238-39.

The principle announced in *Upham* and *White*, and applied in *Terrazas* and *Burton*, does not apply in this case. This is true because, as of this date, no part of the plan adopted by the Chancery Court has been approved by the Attorney General. We think that, for purposes of deference, it is important to note that the plan adopted by the Chancery Court was drafted by the Intervenors (plaintiffs in Chancery Court), not by the Chancery

Court, and not by the Mississippi Legislature, which failed to enact a congressional redistricting plan. Accordingly, there is no expression, certainly no clear expression, of state policy on congressional redistricting to which we must defer. *See Carstens v. Lamm*, 543 F.Supp. 68, 78 (D. Colo. 1982) (where plan had been enacted by state legislature, but vetoed by governor, who submitted his own plan, court regarded those plans as "proffered current policy" rather than clear expressions of state policy); *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 929 (W.D. Mo.) (plan not adopted by state legislature "can hardly be said to demonstrate any legislative intent other than a rejection of the plan"), *aff'd*, 456 U.S. 966 (1982).

Furthermore, as of the date of this opinion, the Chancery Court's plan has not been precleared, in whole or in part. In *United States v. Board of Supervisors of Warren County, Miss.*, 429 U.S. 642 (1977), the Supreme Court held that a three-judge court erred by adopting a plan that had not been precleared, because it exceeded the scope of its jurisdiction under § 5 of the Voting Rights Act. A three-judge court does not have jurisdiction to determine whether a covered change does or does not have the purpose or effect "of denying or abridging the right to vote on account of race or color." *See id.* at 645 (quoting *Perkins v. Matthews*, 400 U.S. 379, 385 (1971)).[2]

Because any state plan implemented for the 2002 elections must comply with § 5, it would appear that ordering implementation of the unprecleared state court plan would require us to make, at least implicitly, the forbidden

[2]On the other hand, the Supreme Court has directed that federal courts, in fashioning congressional redistricting plans, should follow appropriate § 5 standards. *See Abrams v. Johnson*, 521 U.S. 74, 96 (1997); *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981).

determination that the plan (and the Mississippi Supreme Court order, as well), comply with § 5. In their post-trial brief, the Intervenors argue that the plan adopted by the Chancery Court "does not retrogress and therefore complies with the substantive standards of Section 5, . . . does not dilute minority voting strength, and . . . is constitutional." As we have said, the Supreme Court has made it clear that we do not have jurisdiction to make such a determination.

Under § 5, our inquiry "is limited to the determination whether a voting requirement is covered by § 5, but has not been subjected to the required federal scrutiny." *Board of Supervisors*, 429 U.S. at 645-46 (internal quotation marks and citations omitted). We do not think that it can be seriously contested that the changes in state election law represented by the Mississippi Supreme Court's December 13 order granting jurisdiction to the Chancery Court, as well as in the redistricting plan adopted by the Chancery Court, are covered by § 5, and that they have not been precleared as of this date.[3]

[3]In a submission filed on February 15, following the Department of Justice's request for additional information from State authorities, the Intervenors argue that, if the 60-day deadline expires on February 25 without an objection by the Department of Justice, the Chancery Court plan will be precleared automatically. Although the Department of Justice has not sought additional information about the redistricting plan adopted by the Chancery Court, the letter from the Department to the Mississippi Attorney General makes clear that the Department cannot make a determination concerning the Chancery Court plan until it receives the requested information and makes a decision on whether to approve the assignment of jurisdiction to the Chancery Court. The letter states:

> Because the December 13, 2001, Order of the Mississippi Supreme Court . . . and the December 21 & 31, 2001 Orders of the Chancery Court which adopted a redistricting

Thus, until the state court plan has been precleared, we cannot defer to it.

2. Branch Plan 2B

Alternatively, the Intervenors urge us to order implementation of Branch Plan 2B, a slightly modified version of the Chancery Court plan, which reduces by two the number of split counties. They argue that our adoption of Branch Plan 2B would allow implementation of the state policies reflected in the Chancery Court plan without actually ordering that unprecleared plan into effect in its entirety.

We do not think this is the thing to do. At the trial before us, the Intervenors introduced no evidence that the neutral

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> plan, are directly related, it would be inappropriate for the Attorney General to make a determination concerning the congressional redistricting plan adopted by the Chancery Court.

The Intervenors argue, however, that a new 60-day period is not triggered because the information requested by the Department of Justice is unnecessary and irrelevant. We cannot agree. We think that the information requested by the Department of Justice is material and relevant in order for the Department of Justice to understand fully the extent and consequences of a chancery court adopting a United States congressional redistricting plan for the entire state when it has never been done before and when the Mississippi Supreme Court's declaration of jurisdiction seems to constitute a change in both case and statutory law. If this newly asserted change in redistricting authority is not precleared, it renders the plan itself a legal nullity under the Voting Rights Act. Thus, the Department of Justice's decision to investigate the change in state law that authorized the Chancery Court to adopt a redistricting plan, before considering the plan itself, does not constitute "unwarranted administrative conduct." *See Georgia v. United States*, 411 U.S. 526, 541 n.13 (1973).

factors applicable to federal court-ordered redistricting plans were considered in drafting either the plan adopted by the Chancery Court or Branch Plan 2B. Furthermore, based on the evidence presented in the Chancery Court and in the Intervenors' arguments to this court, it seems indisputable that political competitiveness played a major, if not controlling, role in determining how the districts were drawn in each of the plans. Finally, it is evident that compactness was not considered in drafting the plans submitted by the Intervenors. The absence of compactness is most evident in District 1, which includes a group of counties from the Tennessee line in the northernmost part of the State, joined only by a narrow corridor to the southern part of central Mississippi to include Rankin, Madison, and Scott Counties. It is essentially uncontested that political considerations are the only reasons for disregarding historical regional interests. For these reasons, we cannot accept the Branch 2B plan.

3. Postponement of Qualifying Deadline

The Intervenors argue, alternatively, that, if we do not utilize the plan adopted by the Chancery Court or Branch Plan 2B, we should postpone the qualifying deadline to await a preclearance decision. The Intervenors essentially are asking that we defer to the state policies reflected in the unprecleared plan adopted by the Hinds County Chancery Court, when, at the same time, we would have to cast aside the state policy adopted by the Mississippi Legislature when it enacted the statute setting the qualifying deadline.

As we explained in our order of January 15, we are convinced that a postponement of that deadline would likely create confusion, misapprehension and burdens for the voters, for the political parties, and for the candidates. As we said in

our order, many voters want to participate in the election process to a greater extent than mere voting. They want to know the candidates personally, to select their choice, to give money to their selection, and to organize the people in their precincts or counties in the campaign for their choice. Given that all previous districts are being cross-mixed by the loss of one congressional representative, resolving these new problems will take all the pre-primary time that the present statute allows. If we delay the establishment of election districts and advance qualifying dates, such voters who want to become fully involved in the process will not timely know in which district they are going to be placed, and thus will not timely know where and with whom to become involved. The same situation will exist for the candidates. Postponing the election schedule means that the candidates and political parties would encounter campaign and election burdens – that is, significant time constraints on getting acquainted with new voters, establishing organizations in new election districts and the multiple new precincts and counties therein, raising campaign funds within the new districts, developing strategies for particular geographic areas, etc.

Indeed, postponing the election schedule is inconsistent with the position taken in the Mississippi Attorney General's preclearance submission, which requests expedited consideration in order to allow candidates and voters fully to understand the newly enacted district lines prior to the March 1 qualifying deadline. Furthermore, changing the March 1 deadline is inconsistent with the position taken by the Intervenors in their amended complaint filed in Chancery Court, in which they assert that, if a plan is not adopted in time for it to be implemented in advance of the March 1 deadline, "the interests of the plaintiffs and all Mississippi voters in enforcement of Mississippi's election laws will be

compromised, and their rights under Mississippi law to participate in a congressional election process conducted in a timely manner will be violated." We also consider it significant that changing the deadline would contravene the Mississippi Supreme Court's recognition of the importance of such deadlines under state election law. *See Adams County Election Comm'n v. Sanders*, 586 So. 2d 829, 832 (Miss. 1991) (an election schedule that violates the state election code is adverse to the public interest).

In sum, we find that postponement of the qualifying deadline would be damaging to the rights of the voters, the candidates and the political parties, and would contravene established state policy that should be respected. We therefore decline to order postponement of the deadline in order to await a preclearance decision,[4] especially when we have no way of determining if and when preclearance will occur.

4. Black Voting Strength in District 3

The Intervenors object to this court's plan on the ground that it limits black voting strength in District 3. They raised this issue for the first time in their post-trial brief, in which they argued that we should attempt to draw District 3 with a higher percentage of black voting age population than that reflected in the plans submitted by the Plaintiffs. They note that, under the

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[4]On February 14, the Department of Justice requested additional information from State authorities, and indicated that a new 60-day period would begin to run upon the receipt of that information. It is, of course, possible that the Department of Justice can still act before the March 1 candidate qualification deadline. On the other hand, it is not implausible that the Department of Justice may take the full 60 days before making its decision. In any event, we decline to upset the established schedule for the election process which begins on March 1.

former five-district plan, the percentage of black voting age population in former district 4 is 42.94%, and in former district 3, 29.45%. Under this court's plan, the percentage of black voting age population in District 3 is 30.37%. The Intervenors complain that our plan dismantles the black population in former district 4, sending nearly 50% of it to District 2, and retaining only 42.5% of it in District 3, while in the plan adopted by the Chancery Court, only 38.6% of the black population in former district 4 went to the new district 2, and 52.7% of it stayed in the new district 3.

In drafting our plan, we considered race only to the extent that we are allowed to consider it in a redistricting case: The Voting Rights Act required that we draw District 2 with an appropriate percentage of black voting age population in order to assure minority voters a reasonable opportunity to elect their representative of choice. The Intervenors do not argue that our plan results in minority vote dilution in violation of § 2 of the Voting Rights Act. Nor do they claim that the Voting Rights Act requires the creation of a so-called "minority influence" district. *See Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1101 (W.D. Tenn.) (defining an influence district as one in which the population "includes sufficient members of a minority group to influence substantially an election, but not enough to comprise a majority or super-majority as is necessary for a majority-minority district", and stating that such "an influence district exists when members of a minority group compose 25% or more of the voting-age population of a district", and "may also exist when a minority group consists of less than 25% of the voting-age population of a district"), *aff'd*, 516 U.S. 801 (1995).

The Supreme Court has stated that "federal courts may not

order the creation of majority-minority districts unless necessary to remedy a violation of federal law." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993); *see also Balderas v. Texas*, Civ. Action No. 6:01CV158, at 14 (E.D. Tex. 2001) (unpublished) ("We have no warrant to impose our vision of 'proper' restraints upon the political process beyond the constraints imposed by the Constitution or the Voting Rights Act."). The Intervenors cite no authority that would support our consideration of race beyond the extent required by §§ 2 and 5 of the Voting Rights Act. Consequently, we cannot accept the Intervenors' assertion that race should be a factor in drawing the lines for District 3. Even if we assume that the Supreme Court would hold in this case for the first time that the Voting Rights Act requires the creation of a minority "influence" district, the Intervenors have forfeited that claim by failing to raise it; furthermore, they have presented no evidence that would support the claim. To the extent that they are arguing that more minorities are required in District 3 to make the congressional race competitive for democratic candidates, political considerations are inappropriate for a federal court to consider when drafting a congressional redistricting plan. *See Balderas*, at 10 ("political gerrymandering, a purely partisan exercise, is inappropriate for a federal court drawing a congressional redistricting map"). Moreover, because a democratic congressman has been elected and re-elected in former district 5, in which the percentage of black voting age population (18.67% based on 2000 Census figures) is substantially lower than in District 3 in our plan, we are reluctant to accept the Intervenors' implicit assertion that a democratic candidate cannot be competitive in a district in which the percentage of black voting age population is only 30%.

In any event, as a practical matter, we find that it is not

possible for us to increase the percentage of black voting age population in District 3 without splitting counties and precincts unnecessarily, without sacrificing compactness, and without transgressing the requirements of the Voting Rights Act. It is certain that significant retrogression would result in District 2 if black voting age population is shifted from District 2 to increase the percentage of black voting age population in District 3. There are no large concentrations of black voting age population near the borders of Districts 1 and 4 that can be shifted to District 3 so as to increase substantially the percentage of black voting population in District 3. Indeed, the *only* way to increase the percentage of black voting age population in District 3 to the level in the plans submitted by the Intervenors is to remove Rankin County and southern Madison County from District 3, as was done in the plans submitted by the Intervenors. Under any plan of reasonable compactness, Rankin County and southern Madison County cannot be placed in District 2 without causing significant retrogression – that is, significantly lowering the percentage of black voting age population in District 2, which would be violative of § 5 of the Voting Rights Act. Rankin County and southern Madison County cannot be placed in District 4, because they are not adjacent to the border of District 4. They can be placed in District 1 only if a narrow corridor is created to join them with the northernmost counties in the State that reaches to the Tennessee line. To do so would not only violate the compactness principle, but it would also disregard historical regional interests and result in the placement of several large growth areas in a single district.

We thus overrule the Intervenors' objections, and turn now to explain the plan the court adopted in its February 4 order.

III. Court's Plan

The standards applicable to court-ordered congressional redistricting plans are fairly well-established: Courts must satisfy constitutional and statutory criteria and, to the extent feasible, certain neutral, secondary criteria.

A. Constitutional Criterion: Population Equality

The Supreme Court has held that the United States Constitution requires that each congressional district in a state contain equal population. *See Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (Art. I, § 2 of the Constitution requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."). Moreover, the Supreme Court has been an exceedingly strict taskmaster in requiring the lower courts to balance population among districts with precision. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) ("[T]he 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small."); *Karcher v. Daggett*, 462 U.S. 725, 734 (1983) ("there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification"). Nevertheless, the Court is "willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts," so long as it is shown "with some specificity that a particular objective required the specific deviations." *Id.* at 740-41.

In *Abrams v. Johnson*, 521 U.S. 74 (1997), the Court stated that "[c]ourt-ordered districts are held to higher standards of population equality than legislative ones," but that "[s]light deviations are allowed" if supported by "'historically significant state policy or unique features.'" *Id.* at 98 (quoting *Chapman v. Meier*, 420 U.S. 1, 26 (1975)). The court-ordered plan in *Abrams* had an overall population deviation (the difference in population between the two districts with the greatest disparity) of 0.35%, and an average population deviation (the average of all districts' deviation from perfect one-person, one-vote allocation) of 0.11%. *Id.* at 99. The district court enumerated the following state policies and conditions as justification for the deviations: (1) Georgia's strong historical preference for not splitting counties outside the Atlanta area; and (2) maintaining core districts and communities of interest. *Id.* at 99-100. The district court found that the small counties among Georgia's 159 counties represented communities of interest to a much greater degree than was common, and the Supreme Court agreed that "such a proliferation provides ample building blocks for acceptable voting districts without chopping any of those blocks in half." *Id.* at 100 (internal quotation marks and citation omitted). The Court observed that, even if it had found the population deviation unacceptable, it "would require some very minor changes in the court's plan – a few shiftings of precincts – to even out the districts with the greatest deviations." *Id.*

Thus, our task in drafting the map was to make every good-faith effort to place 711,164 people in each of two districts and 711,165 people in each of the other two districts, which is based on a total population of 2,844,658, according to 2000 Census figures. *See Karcher*, 462 U.S. at 738 ("because the census count represents the best population data available, it is the only basis for good-faith attempts to achieve population

equality" (internal quotation marks and citation omitted)). Obviously, this is not an easy task when, at the same time, we are trying to prevent retrogression in District 2 and trying not to make unnecessary divisions of counties and municipalities. Nevertheless, we have been able to achieve virtual equality: Districts 3 and 4 each contain 711,164 persons. District 1 contains 711,160 persons (five too few), and District 4 contains 711,170 persons (five too many). This seems to comply fully with the Supreme Court's requirements.[5]

In sum, our plan satisfies the constitutional standard of one-person, one-vote, as enunciated by the Supreme Court. Having concluded that we have satisfied the constitutional criteria, we now turn to consider the statutory requirements.

B. Statutory Criteria

The two statutes we have to consider are §§ 2 and 5 of the Voting Rights Act. *See Abrams*, 521 U.S. at 90 ("On its face, § 2 does not apply to a court-ordered remedial redistricting plan, but we will assume courts should comply with the section when exercising their equitable powers to redistrict."); *id.* at 96 (application of § 5 standards to a court-ordered plan "is a reasonable standard, at the very least an equitable factor to take into account, if not as a statutory mandate"); *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981) (although court-devised plans are not subject to preclearance requirements, "in fashioning the plan, the court should follow the appropriate Section 5 standards, including the body of administrative and

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[5]In order to achieve absolute perfection, we would have to split precincts. We find, based on the testimony of Sue Sautermeister, that splitting precincts would cause administrative problems for election officials and confusion and frustration for voters.

judicial precedents developed in Section 5 cases").

1. Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act prohibits any voting procedure that "results in a denial or abridgement of" the voting rights of a person on account of race, color, or membership in a language minority. 42 U.S.C. § 1973(a). A violation of § 2 is established by showing that "based on the totality of the circumstances," members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

As we have earlier noted in addressing their objections, the Intervenors object to our plan on the ground that it limits black voting strength in District 3, but they do not argue that our plan violates § 2. Nevertheless, as the Supreme Court has instructed federal redistricting courts to do, we have considered § 2 in drafting our plan. The minority population in Mississippi is sufficiently large and geographically compact to constitute a majority in only one of Mississippi's four congressional districts. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (setting forth elements of vote dilution challenge to multimember districts); *see also Growe v. Emison*, 507 U.S. 25, 40-41 (1993) (*Gingles* elements for vote dilution claim apply in challenges to single-member districts). Our plan creates a majority-minority district, District 2. Accordingly, we conclude that it does not result in minority vote dilution in violation of § 2. Consequently, we move on to discuss § 5.

2. Section 5 of the Voting Rights Act

The requirements of § 5 focus our attention first and primarily on District 2, in order to assure that our plan does not result in significant retrogression in the position of minorities with respect to their opportunity to elect their representative of choice. *See Puerto Rican Legal Defense & Education Fund, Inc. v. Gantt*, 796 F. Supp. 681, 691 (E.D.N.Y. 1992) ("a court-drawn plan should be drafted so that it will not lead to retrogression in the position of a racial or language minority group with respect to their opportunity to exercise the electoral franchise effectively").

The percentage of black voting age population in district 2 under the former five-district plan, based on 2000 Census figures, is approximately 61%. Under our plan, the percentage of black voting age population in District 2 is 59.2%. This does not constitute retrogression in the voting rights of minorities in violation of § 5.

In sum, we are thus satisfied that our plan satisfies the criteria of all applicable federal statutes. We now turn to discuss the secondary criteria that we considered in drafting our plan.

C. Secondary Criteria

In addition to the constitutional and statutory criteria, federal redistricting courts generally apply neutral factors, including compactness, contiguity, and respect for historical local political boundaries, in drafting congressional redistricting plans. *See Balderas*, at 5; *Gantt*, 796 F. Supp. at 685.

Based on the evidence presented to us, we applied the following secondary factors, listed in the order of priority given to each factor: (1) compactness and contiguity; (2) respect for county and municipal boundaries; (3) preservation of historical and regional interests; (4) placement of the major research universities and military bases, respectively, in separate districts; (5) placement of at least one major growth area in each district, and avoidance of placement of several major growth areas in the same district, so as to minimize population deviation among the districts as Mississippi's population changes; (6) inclusion of as much as possible of southwest Mississippi from former district 4, and east central Mississippi from former district 3, in the new District 3; (7) protection of incumbent residences; and (8) consideration of the distances of travel within each district. We now turn to explain further how we applied each of the factors we considered in drafting our plan.

1. Compactness and Contiguity

"The compactness requirement specifies that the boundaries of each congressional district shall be as short as possible." *Carstens*, 543 F. Supp. at 87. The contiguity requirement "specifies that no part of one district be completely separated from any other part of the same district." *Id.* at 88 (internal quotation marks and citation omitted). These criteria "were originally designed to represent a restraint on partisan gerrymandering." *Id.* at 87; *see also Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688 (D. Ariz. 1992) ("Districts that are geographically compact and contiguous are less likely to suffer from the ills of gerrymandering [and] assist in maintaining communities of interest"), *aff'd*, 507 U.S. 981 (1993).

"In addition to serving as a check on gerrymandering,

compactness 'facilitates political organization, electoral campaigning, and constituent representation.'" *Good v. Austin*, 800 F. Supp. 557, 563 (E.D. & W.D. Mich. 1992) (quoting *Karcher*, 462 U.S. at 756 (Stevens, J., concurring)); *Carstens*, 543 F. Supp. at 87 ("Compact districts . . . reduce electoral costs (in both time and money) and increase the opportunities for more effective representation by concentrating a congressperson's constituency in an easily accessible area."). "In a practical sense, the compactness of a congressional district will be directly affected by the density and distribution of a state's population. Since population requirements have priority, compactness must often be sacrificed in order to achieve an acceptable range of population deviation." *Id.*

This court has attempted to achieve, as nearly as possible, four compact districts. The ability to create compact districts in Mississippi is limited by the distribution of population. Much of the State is rural, with large concentrations of population in only a few areas of the State. Districts that contain many sparsely populated counties and large rural areas necessarily will be less compact than districts that contain heavily populated counties and urban areas, as a result of the population equality requirement. Furthermore, a more compact plan cannot be drawn for two additional reasons: First, it would not be possible to do so and to prevent retrogression in District 2; and secondly, it would be a barrier to including as much as possible of the former districts 3 and 4 in the new District 3.

2. Respect for County and Municipal Boundaries

As Justice Stevens observed in his concurring opinion in *Karcher*,

> [s]ubdivision boundaries tend to remain stable over time. Residents of political units such as townships, cities, and counties often develop a community of interest, particularly when the subdivision plays an important role in the provision of governmental services. In addition, legislative districts that do not cross subdivision boundaries are administratively convenient and less likely to confuse the voters.

Karcher, 462 U.S. at 758 (Stevens, J., concurring).

To the extent possible, consistent with the constitutional and statutory requirements, federal redistricting courts attempt to preserve local political boundaries – city and county lines. *See Balderas*, at 7; *Arizonans*, 828 F. Supp. at 688 ("a state has a substantial interest in preserving city and county lines" because of "the importance of shared local experiences and the ability of groups and candidates to 'network' within their communities'"; furthermore, "[p]reserving these communities of interest also enables a congressman to represent his constituency better"); *Carstens*, 543 F. Supp. at 88 (county and municipal boundaries "should remain undivided whenever possible because the sense of community derived from established governmental units tends to foster effective representation"). "Unnecessary fragmentation of these units not only undermines the ability of constituencies to organize effectively but also . . . increases the likelihood of voter confusion regarding other elections based on political subdivision geographics." *Id.* (internal quotation marks and citation omitted). We turn now to address these concerns as

they apply to the redistricting map that we have drawn.

We should first note that the priority given to the constitutional requirement of population equality makes the division of some counties unavoidable. *See Balderas*, at 16 ("It is an ugly fact that the law's insistence on absolute population equality in court-drawn plans has the perverse effect of splitting counties and cities, when a tolerance of greater deviation would not demand such undesirable divisions."). Our plan splits eight counties: Hinds, Jasper, Jones, Leake, Madison, Marion, Webster, and Winston. We do observe, however, that eleven counties are split under the five-district congressional redistricting plan adopted by the Mississippi Legislature in 1992.

Under the five-district plan, Jasper County is in district 3, and Marion County is in district 4. Our plan splits each of these counties, placing part of each in District 3 and the remainder in District 4. This was done as part of the effort to create a compact new District 4, as well as to equalize, as nearly as practicable, the population among the districts. In dividing these counties, we also took into consideration our attempt to combine as much of former districts 3 and 4 in new District 3 as is feasible, as we later explain. In making these divisions, we made every effort to respect the boundaries of municipalities. Jasper County is split in a particular way so as to avoid splitting the precincts which lie within the boundaries of the town of Bay Springs.

Hinds and Madison Counties are split as part of the effort to achieve population equality. In addition, it was necessary to split these counties so as to prevent retrogression in District 2. If we had included these areas, which have a majority white population, in District 2, that district would have had a

significantly lower percentage of black voting age population. We could not have placed these portions of Hinds and Madison Counties in District 4, because it is not contiguous to them. Furthermore, we could not have placed them in District 1 without ignoring completely the compactness requirement.

We did split the City of Jackson in Hinds County. It is the only municipality that is split. However, Mayor Johnson testified in Chancery Court that he preferred that the City be represented by two congresspersons. In addition, as we have earlier noted with respect to why Hinds County was split, it was also, necessary to split the City of Jackson to prevent retrogression in District 2.

Leake County is also split as part of the effort to prevent retrogression in District 2, and to help achieve population equality among the districts. The irregularity of the border is explained by our effort to keep all of the precincts which lie within the municipal boundaries of the City of Carthage in the same district.

Jones County is split so as not to remove the incumbent from his district and also to help achieve population equality.

Webster County is split to avoid dividing the town of Maben, which lies partially in Oktibbeha County and partially in Webster County, among two districts.

Winston County is split solely to achieve the maximum possible equality of population among the districts.

In sum, the county splits are necessitated by: the population equality requirement; preservation of the majority-minority district with an appropriate percentage of black voting

age population; combining as much as possible of former districts 3 and 4 in the new District 3; and avoiding having incumbents districted out of their residences.

3. Historical and Regional Interests

In addition to the communities of interest represented by counties and municipalities, there are other communities of interest "which share common concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socio-economic status or trade." *Carstens*, 543 F. Supp. at 91. "[T]he preservation of regional communities of interest within a single district enhances the ability of constituents with similar regional interests to obtain effective representation of those interests." *Good v. Austin*, 800 F. Supp. at 564.

Based on the evidence presented at trial, it became apparent that there are distinct communities of interest represented by the geographical regions of the State, which are reflected in the former five-district congressional redistricting plan. Because we were reducing the districts from five to four, respecting each regional community of interest became problematic when we were required to combine two districts into a single district. At the outset, § 5 of the Voting Rights Act dictated that the protected majority-minority district be drawn first. There was very little choice as to the placement of that district, because the largest concentration of black voting age population is in the Delta and along the Mississippi River. Once we had drawn that district, the compactness principle argued that the remainder of the State be divided into a northern district, a central district, and a southern district – at least to the extent possible and practicable. Based on the distribution of the population within the State, it became further

apparent that it would be necessary to include both southwest Mississippi (located in former district 4) and east central Mississippi (located in former district 3) in the same district.

In sum, we strove to respect the communities of interest represented in the former five-district plan, to the extent other more compelling circumstances allowed. In applying this factor, we considered only the interests of the residents of Mississippi, and not those of the incumbent congresspersons. In sum, given the constraints of population equality, our plan preserves as much as possible the cores of the Mississippi River/Delta region, east central Mississippi, southwest Mississippi, north Mississippi, and the Gulf Coast region.

4. Universities and Military Bases

The evidence at trial was undisputed that the four major research universities (the University of Mississippi, Jackson State University, Mississippi State University, and the University of Southern Mississippi) should be placed in separate districts so that they will not have to compete for federal funding. Our plan achieves that goal.

Under the former five-district plan, the military bases in Lowndes and Lauderdale Counties were located in former district 3. Several witnesses testified at trial regarding the importance of the military bases to the State's economy, and that it would be preferable to place those bases in separate districts so that, if both were targeted for closure, each would have a separate congressperson working to prevent closure. We found this testimony to be persuasive: A congressperson with only one military base in his or her district is much more likely to be successful in preventing its closure than a congressperson who has two military bases in his or her

district. Our plan is therefore drawn with due consideration that the military bases located in Lowndes, Lauderdale, and Harrison Counties are in separate districts.

5. Growth Areas

Although much of Mississippi is rural, there are several high-growth areas. The largest of these growth areas are in DeSoto County in north Mississippi, in Hancock, Harrison, and Jackson Counties in south Mississippi, and in Hinds, Rankin, and Madison Counties in central Mississippi. We found persuasive the testimony at trial regarding the undesirability of placing several high-growth areas in the same district, because of the competition for federal funding for infrastructure. In addition, as population growth continues over time, placement of too many high-growth areas in the same district would result in malapportionment much more quickly than it would if the growth areas are distributed evenly among the districts. Accordingly, our plan is drawn with consideration that each district has at least one major growth area. District 1 contains DeSoto County, as under the former five-district plan. District 2 contains the Nissan Plant/Gluckstadt area of Madison County, as under the former five-district plan, and almost all of Hinds County, including much of the City of Jackson and the Byram and Clinton areas. District 3 contains southern Madison County and Rankin County. District 4 contains the Gulf Coast area.

6. Combination of Former Districts 3 and 4

As noted, protection of the majority-minority district as required by § 5 of the Voting Rights Act, and application of the compactness principle, dictated that the new District 3 contain a combination of the southwestern portion of the State, which

was located in former district 4, and the east central portion of the State, which was located in former district 3. Accordingly, in drawing the new District 3, consideration was given to including as much of the former districts 3 and 4 in the new combined District 3 as possible, subject to the constraints of the population equality principle, the prevention of retrogression in District 2, and the neutral requirement of compactness. It seemed to us that combining old districts 3 and 4 as much as possible would have the initial effect, in our map-drawing efforts, of being less disruptive to the other three established districts as we redrew their respective lines. We also concluded that combining the two districts to the extent possible helped to achieve compactness of the new District 3, as well as the other new districts. At the core of our reasoning, however, was an attempt to preserve intact, as much as possible, the communities of interest in southwest, east central, and central Mississippi.

The new District 3 contains all or part of fourteen counties from each of the former districts 3 and 4, respectively.

The new District 3 includes the portion of Jones County which contains the residence of the incumbent for former district 3. It includes all or part of fourteen of the nineteen counties included within former district 3: Jasper, Jones, Kemper, Lauderdale, Leake, Madison, Neshoba, Newton, Noxubee, Oktibbeha, Rankin, Scott, Smith, and Winston. It is, however, necessary to eliminate: the portions of Attala County and Wayne County that are in former district 3 for concerns of retrogression and population equality, respectively; and all of Clarke, Clay, and Lowndes Counties, primarily because of population equality.

The new District 3 includes all of Jefferson Davis County,

which contains the residence of the incumbent for former district 4. It includes all or part of fourteen of the fifteen counties that were included within former district 4: Adams, Amite, Covington, Franklin, Hinds, Jefferson Davis, Jones, Lawrence, Lincoln, Marion, Pike, Simpson, Walthall, and Wilkinson. It is, however, necessary to eliminate Copiah County for reasons of population equality with District 2 and to prevent retrogression of voting rights of black residents of District 2.

7. Protection of Incumbent Residences

The only political consideration that we took into account in drafting our plan was to assure that no incumbent would be required to move in order to run in the district in which he resides. *See Arizonans*, 828 F. Supp. at 688 (court should avoid unnecessary or invidious outdistricting of incumbents, because "maintenance of incumbents provides the electorate with some continuity").

8. Distance of Travel Within Districts

After consideration of all of the above factors, we considered traveling distances within the districts. However, we recognized that application of the compactness principle generally minimizes the distance of travel within each congressional district. Nevertheless, we took into consideration the existing roads and highways in the State, and how that would affect the ability of a candidate, and ultimately the elected representative, to travel throughout his or her district. As is expected to occur when the number of districts is reduced from five to four, the distances of travel within the districts are increased.

The distance of travel within District 1 is approximately the same size as under the plans submitted by the Plaintiffs, and is substantially less than it is under the plans submitted by the Intervenors. The new District 2 is slightly larger than former district 2, but this is unavoidable in the light of the population deficit in former district 2, which grew more slowly than any other district in the State. We recognize that travel distances in the new District 3 are considerably greater than in either of the former districts 3 and 4. The distance of travel within new District 3 is dictated by our combining much of former districts 3 and 4 (which we have previously explained), as well as by the effort to keep the four major research universities in separate districts. The distance of travel in District 3 under our plan is, however, not as great as it is in the plans submitted by the Intervenors. The distance of travel in new District 4 is slightly greater than it is in former district 5. This is necessitated by the population equality principle as well as by our effort to include in District 3 as much of former district 4 as is feasible. The distance of travel within new District 4 is substantially less than that within district 4 in some of the plans submitted by the Plaintiffs.

Conclusion

In sum, the court has attempted to apply all appropriate neutral factors that are recognized by the United States Supreme Court and federal redistricting courts. As noted, these factors include, first, the constitutional demand for population equality among the districts, and secondly, the Voting Rights Act requirement that one equally populated district be drawn to include a majority of black residents of voting age. While respecting county, city and precinct lines and the compactness of each district, the court sought to give appropriate weight to the following factors: respect for historical and regional

interests to the extent feasible; placement of growth areas, research universities and military bases in separate districts if otherwise practicable; inclusion of as much as possible of the former districts 3 and 4, representing the communities of interest in southwest and east central Mississippi, in the new District 3; avoiding the outdistricting of incumbents; and minimizing travel distances within the districts, consistent with the other requirements. When all feasible adjustments were made for these factors, further adjustments were necessary to satisfy one person-one vote requirements, and retrogression concerns.

IV. Effective Date of Plan

The Attorney General of Mississippi submitted the plan adopted by the Chancery Court, as well as the Mississippi Supreme Court's December 13 order holding that the Chancery Court had jurisdiction to adopt a congressional redistricting plan, to the United States Attorney General for preclearance on December 26, 2001, and requested expedited preclearance by January 31, 2002. The plan adopted by the Chancery Court cannot be implemented unless the Attorney General of the United States "has interposed no objection within a 60-day period following submission." 28 C.F.R. § 51.1(2). The initial 60-day period was to end on February 25, 2002. *See* 28 C.F.R. § 51.9. However, on February 14, the Department of Justice requested additional information and indicated that a new 60-day period would begin to run upon the receipt of that information. The deadline for congressional candidates to qualify to run for Congress in 2002 is March 1. *See* Miss. Code Ann. § 23-15-299(3).

A three-judge district court in New York was faced with a situation similar to the one before this court. *See Gantt*, 796 F.

Supp. 681. After the special master appointed by the court had filed his proposed plan, the New York Legislature enacted a redistricting plan, which was signed by the Governor and submitted for preclearance. The court was faced with a July 9, 1992 deadline under state law for candidates to begin gathering signatures on petitions. Under those circumstances, while preclearance of the legislature's plan was pending before the Department of Justice, the court ordered that, if the plan adopted by the New York Legislature had not been precleared by 5:00 p.m. on July 8 (the day before the signature-gathering deadline), the special master's plan would be used for the 1992 congressional elections. *Id.* at 686, 697. In short, the court made clear that it did not have to wait on preclearance before it acted in order to assure that the election process proceeded on schedule.[6]

The Intervenors have urged us not to enjoin implementation of the plan adopted by the Chancery Court, and not to order that our plan be implemented, until after the expiration of the 60-day period. In addition, they have argued that we should postpone the qualifying deadline if the Attorney General requests more information or objects to the plan adopted by the Chancery Court. As we have earlier noted, such a request for additional information was made on February 14. Furthermore, the Intervenors have indicated that they intend to seek immediate relief from the Supreme Court of the United States if this court does not accept their contentions.

Nevertheless, for the reasons we have already stated, we

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[6]As it turned out, the Department of Justice precleared the state legislature's plan one week before the signature-gathering deadline. *See Puerto Rican Legal Defense & Education Fund, Inc. v. Gantt*, 796 F. Supp. 698, 698 (E.D.N.Y. 1992).

decline to postpone the qualifying deadline. It has been the position of this court – which has been expressly conveyed to the parties, first as early as November 30, 2001, and several times since then – that this court did not intend to postpone the election process which begins on March 1. In short, everyone understood that some plan must be in place, upon which all of the parties and the voters could rely, on or before March 1. We assume that the Department of Justice has been aware of this position, at least since it received the preclearance submission on December 26, 2001. Indeed, we note that, in Hinds County Chancery Court, the Intervenors argued that a plan had to be precleared "at least a couple of weeks before March 1."

The plaintiffs and the Mississippi Republican Executive Committee have argued that, because potential candidates need time to evaluate the new district lines and to make their decisions, this court's plan should take effect if the Chancery Court plan has not been precleared by February 15. In addition, the Plaintiffs argue that, if we wait until the expiration of the 60-day preclearance period, we will have insufficient time to consider and rule on their claims that, (1) even if the Mississippi Supreme Court's order authorizing the Chancery Court to adopt a redistricting plan, as well as the plan adopted by the Chancery Court, are ultimately precleared, we should nevertheless enjoin implementation of the Chancery Court's plan, because subsequent preclearance does not cure the violation of § 5 that occurred when the Chancery Court acted on the basis of an unprecleared change in state election law; and (2) irrespective of whether the state court plan is precleared, the Chancery Court's adoption of a plan usurps authority constitutionally delegated only to the Mississippi Legislature, in violation of Article I, § 4 of the United States Constitution, which provides, in relevant part, that "The Times, Places and Manner of Holding Elections for Senators and

Representatives, shall be prescribed in each State by the Legislature thereof . . ."[7]

We also recognize that voters, as well as potential candidates, are experiencing confusion and frustration as a result of the uncertainties as to which redistricting plan ultimately will be implemented. We are further cognizant of the difficulties faced by persons wishing to run for Congress as independents. An individual who wishes to be placed on the ballot as an independent candidate is required to file a petition containing the signatures of not less than 200 qualified electors in the district in which he or she intends to run for office. *See* Miss. Code Ann. § 23-15-359(1)(c). The petition must be filed with the State Board of Election Commissioners no later than 5:00 p.m. on the qualifying deadline. *See* Miss. Code Ann. § 23-15-359(3). If the boundaries of the districts are uncertain until the close of business on February 25, persons who wish to run for Congress as independents would have only three days during which to gather and to present the necessary signatures to ensure their placement on the ballot.[8]

Nevertheless, we have determined that it would be premature to order the implementation of this court's plan until

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[7]We consider this question to raise a serious constitutional issue, that is, whether there must be *some* legislative source that connects the state redistricting body to its authority to redistrict a state for United States congressional elections. For example, in *Growe v. Emison*, the Minnesota Supreme Court, in appointing a special redistricting panel, relied on authority granted by specific (but admittedly vague) statutes.

[8]We recognize the possibility that individuals who wish to run as independent candidates may be inconvenienced by having only three days to gather signatures. We do note, however, that there are some counties that will be in the same districts under the plan adopted by the Chancery Court and under this court's plan.

the Department of Justice has had the full initial 60-day period to preclear the plan adopted by the Chancery Court, and the Mississippi Supreme Court order that authorized the Chancery Court to act. Accordingly, we hold that, if the Chancery Court plan has not been precleared before the close of business on Monday, February 25, 2002, the congressional redistricting plan attached to our order of February 4, 2002, shall operate as the plan for congressional districts for the State of Mississippi for the 2002 congressional elections, and, on February 26, 2002, an injunction shall be entered directing the defendants to conduct the 2002 congressional elections pursuant to the congressional redistricting plan attached to our February 4 order.

SO ORDERED, this, the 19th day of February, 2002.

/s/ E. Grady Jolly
E. GRADY JOLLY
United States Circuit Judge

/s/ Henry T. Wingate
HENRY T. WINGATE
United States District Judge

/s/ David C. Bramlette
DAVID C. BRAMLETTE
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN ROBERT SMITH,
SHIRLEY HALL, AND
GENE WALKER
PLAINTIFFS

V. CIVIL ACTION NO. 3:01-CV-855WS

ERIC CLARK, Secretary of State
of Mississippi; MIKE MOORE,
Attorney General for the State
of Mississippi; RONNIE MUSGROVE,
Governor of Mississippi; MISSISSIPPI
REPUBLICAN EXECUTIVE COMMITTEE; AND
MISSISSIPPI DEMOCRATIC EXECUTIVE
COMMITTEE
DEFENDANTS

(Filed Feb. 4, 2002)

ORDER

Attached hereto is this court's congressional redistricting plan for the State of Mississippi, along with an analysis thereof. This court proposes to implement this plan absent the timely preclearance of the redistricting plan adopted by the State Chancery Court, which is now pending for preclearance before the United States Attorney General.

The parties are hereby directed to show cause by written objections, why this court's redistricting plan, if implemented,

would not satisfy all state and federal statutory and constitutional requirements; and to make any other critical comments and suggestions with respect to the plan that the parties deem appropriate. Said objections, comments and suggestions must be filed with the Clerk of the United States District Court for the Southern District of Mississippi no later than 4:00p.m. on Friday, February 9. Failure to object in accordance with this order will be deemed a waiver of all further objections to this plan.

So ORDERED, this the 4th day of February, 2002.

/s/ E. Grady Jolly
E. GRADY JOLLY
UNITED STATES CIRCUIT JUDGE

/s/ Henry T. Wingate
HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

/s/ David C. Bramlette, III
DAVID C. BRAMLETTE, III
UNITED STATES DISTRICT JUDGE

Congressional Redistricting Plan
Smith v. Clark
United States District Court
Southern District of Mississippi
February 4, 2002



BEST AVAILABLE COPY

Plan: Congressional Redistricting Plan
Plan Type:
Administrator:
User:

Population Summary Report

Monday, February 4, 2002 7:54 AM

DISTRICT	POPUL.	DEVIATION	% Devn.	[18+_Pop]	[18+_Blk]	[%18+_Blk]
1	711,160	-5	0.00	521,745	124,207	23.81%
2	711,164	-1	0.00	501,887	297,121	59.20%
3	711,164	-1	0.00	523,593	158,994	30.37%
4	711,170	5	0.00	522,246	104,937	20.09%

Total Population: 2,844,658
Ideal District Population: 711,165

Summary

Population Range:	711,160 or 711,170
Ratio Range:	1.00
Absolute Range:	-5 to 5
Absolute Overall Range:	10.00
Relative Range:	0.00% to 0.00%
Relative Overall Range:	0.00%
Absolute Mean Deviation:	3.00
Relative Mean Deviation:	0.00%
Standard Deviation:	4.12

Political Subdivisions Split Between Districts

Monday, February 4, 2002 7:50 AM

Number of subdivisions not split:
County 74

Number of subdivisions split into more than one district:
County 8

Number of subdivision splits which affect *no* population:
County 0

Split Counts

County

Cases where a County is split among 2 Districts: 8

Number of times a County has been split into more than one district: 8

Total of County splits: 16

County	District	Population
Split Counties:		
Hinds	2	218,968
Hinds	3	31,832
Jasper	3	7,212
Jasper	4	10,937
Jones	3	2,235
Jones	4	62,723

Leake	2	11,361
Leake	3	9,579
Madison	2	27,631
Madison	3	47,043
Marion	3	9,742
Marion	4	15,853
Webster	1	9,544
Webster	3	750
Winston	1	134
Winston	3	20,026

Plan Components Report

Monday, February 4, 2002 8:02 AM

	Population	[18+ Pop]	[18+ Blk]
District 1			
Alcorn County	34,558	26,310	2,645
Benton County	8,026	5,867	1,942
Calhoun County	15,069	11,270	2,892
Chickasaw County	19,440	13,874	5,196
Choctaw County	9,758	7,044	1,934
Clay County	21,979	15,643	8,129
DeSoto County	107,199	77,005	8,063
Grenada County	23,263	16,945	6,385
Itawamba County	22,770	17,257	1,065
Lafayette County	38,744	31,170	6,908
Lee County	75,755	54,793	11,904
Lowndes County	61,586	43,963	16,500
Marshall County	34,993	25,695	12,185
Monroe County	38,014	27,673	7,757
Panola County	34,274	24,193	10,518
Pontotoc County	26,726	19,351	2,527
Prentiss County	25,556	19,170	2,330
Tate County	25,370	18,502	5,385
Tippah County	20,826	15,620	2,297
Tishomingo County	19,163	14,724	465
Union County	25,362	18,783	2,554
Webster County			
VTD: Bellefontaine	550	413	44
VTD: Big Black	420	301	5
VTD: Bluff Springs	287	210	96
VTD: Cadaretta	227	191	22
VTD: Clarkson	673	492	38

VTD: Cumberland	505	359	65
VTD: Eupora 1	1,440	1,011	517
VTD: Eupora 2	701	537	73
VTD: Eupora 3	881	672	115
VTD: Fame	489	372	8
VTD: Fay	219	166	12
VTD: Grady	409	310	40
VTD: Mantee	572	454	39
VTD: Mathiston	897	656	79
VTD: North Walthall	263	190	7
VTD: South Walthall	302	228	44
VTD: Tomnolen	709	517	63
Webster County Subtotal	**9,544**	**7,079**	**1,267**
Winston County			
VTD: Gum Branch	134	103	12
Winston County Subtotal	**134**	**103**	**12**
Yalobusha County	13,051	9,711	3,347
District 1 Subtotal	**711,160**	**521,745**	**124,207**
District 2			
Attala County	19,661	14,562	5,321
Bolivar County	40,633	28,587	17,107
Carroll County	10,769	8,134	2,788
Claiborne County	11,831	8,724	7,145
Coahoma County	30,622	20,514	13,183
Copiah County	28,757	21,014	9,939
Hinds County			
VTD: 1	297	251	143

VTD: 10	731	546	526
VTD: 11	984	745	698
VTD: 12	1,062	764	758
VTD: 13	1,309	955	942
VTD: 15	488	410	67
VTD: 16	2,132	1,530	1,115
VTD: 18	1,227	899	858
VTD: 19	1,148	854	845
VTD: 2	940	710	695
VTD: 20	1,880	1,237	1,213
VTD: 21	1,022	637	573
VTD: 22	2,605	1,817	1,770
VTD: 23	2,484	1,680	1,672
VTD: 24	2,382	1,345	1,195
VTD: 25	2,463	1,511	1,394
VTD: 26	1,328	844	709
VTD: 27	1,931	1,512	1,492
VTD: 28	2,053	1,630	1,612
VTD: 29	1,037	804	799
VTD: 30	1,426	995	984
VTD: 31	1,939	1,452	1,438
VTD: 38	1,442	1,007	562
VTD: 39	1,695	1,154	1,061
VTD: 4	1,121	743	732
VTD: 40	2,391	1,752	1,683
VTD: 41	2,818	2,004	1,965
VTD: 42	3,156	2,319	1,791
VTD: 43	4,359	2,968	2,350
VTD: 47	3,107	2,444	2,015
VTD: 5	1,995	1,702	725
VTD: 50	968	706	648
VTD: 51	1,013	677	662
VTD: 52	2,319	1,598	1,536
VTD: 53	585	391	374

VTD: 54	1,149	887	742
VTD: 55	1,848	1,226	1,127
VTD: 56	1,027	610	586
VTD: 57	1,436	940	910
VTD: 58	2,025	1,477	1,428
VTD: 59	3,079	1,797	1,730
VTD: 6	2,314	1,751	936
VTD: 60	987	597	545
VTD: 61	2,406	1,524	1,429
VTD: 62	2,545	1,631	1,430
VTD: 63	1,062	772	763
VTD: 64	1,101	821	800
VTD: 66	231	160	158
VTD: 67	2,186	1,408	1,191
VTD: 68	4,122	2,842	1,767
VTD: 69	2,083	1,340	841
VTD: 70	1,230	774	388
VTD: 71	2,069	1,391	698
VTD: 72	2,477	1,506	865
VTD: 73	1,887	1,367	570
VTD: 74	1,597	1,099	406
VTD: 75	1,430	943	423
VTD: 76	2,526	1,891	474
VTD: 77	2,601	1,798	596
VTD: 80	3,625	2,332	2,135
VTD: 81	2,131	1,614	1,477
VTD: 82	2,252	1,564	1,495
VTD: 83	4,481	3,123	2,854
VTD: 84	420	326	295
VTD: 85	3,943	2,759	2,733
VTD: 86	2,615	1,506	1,407
VTD: 87	2,095	1,381	957
VTD: 88	2,927	2,091	1,614
VTD: 89	2,114	1,433	902

VTD: 90	1,666	1,213	494
VTD: 91	3,212	2,090	1,643
VTD: 92	3,598	2,481	1,106
VTD: 93	1,845	1,293	773
VTD: 94	3,657	2,442	1,830
VTD: 95	910	657	179
VTD: 96	2,828	2,143	713
VTD: 97	659	486	109
VTD: Bolton	1,894	1,406	938
VTD: Brownsville	754	556	315
VTD: Byram 1	4,541	3,264	471
VTD: Byram 2	2,063	1,567	168
VTD: Cayuga	491	375	218
VTD: Chapel Hill	1,378	980	454
VTD: Clinton 1	4,406	3,713	543
VTD: Clinton 2	5,301	3,717	558
VTD: Clinton 3	4,439	3,352	740
VTD: Clinton 4	2,201	1,602	192
VTD: Clinton 5	1,590	1,231	57
VTD: Clinton 6	3,697	2,710	714
VTD: Cynthia	1,005	714	516
VTD: Dry Grove	1,076	798	221
VTD: Edwards	3,715	2,552	1,893
VTD: Jackson State	1,658	1,596	1,579
VTD: Learned	924	661	308
VTD: Old Byram	2,930	2,183	201
VTD: Pinehaven	2,749	1,932	823
VTD: Pocahontas	620	483	310
VTD: Raymond 1	3,346	2,237	911
VTD: Raymond 2	4,264	3,595	1,316
VTD: Spring Ridge	4,297	3,045	1,070
VTD: St. Thomas	560	390	374
VTD: Terry	5,242	3,958	1,442
VTD: Tinnin	901	611	143

VTD: Utica 1	1,297	953	388
VTD: Utica 2	1,396	965	732
Hinds County Subtotal	**218,968**	**155,226**	**98,716**
Holmes County	21,609	14,670	10,899
Humphreys County	11,206	7,541	5,052
Issaquena County	2,274	1,645	962
Jefferson County	9,740	6,937	5,851
Leake County			
VTD: Conway	961	684	434
VTD: East Carthage	1,645	1,270	178
VTD: North Carthage	2,035	1,396	324
VTD: Ofahoma	660	463	372
VTD: Singleton	1,495	1,104	243
VTD: South Carthage	1,380	1,174	590
VTD: Thomastown	860	642	323
VTD: West Carthage	1,506	974	664
VTD: Wiggins	819	586	408
Leake County Subtotal	**11,361**	**8,293**	**3,536**
Leflore County	37,947	26,667	16,855
Madison County			
VTD: Bible Church	964	509	493
VTD: Camden	1,714	1,119	920
VTD: Cameron	120	96	47
VTD: Canton Pct. 7	707	519	459
VTD: Canton Precinct 1	2,644	1,824	1,187
VTD: Canton Precinct 2	2,511	1,886	795
VTD: Canton Precinct 3	603	413	260
VTD: Canton Precinct 4	3,332	2,263	1,820
VTD: Canton Precinct 5	1,732	1,082	1,070
VTD: Couparle	49	41	33

VTD: Gluckstadt	3,432	2,519	336
VTD: Liberty	2,118	1,426	1,262
VTD: Luther Branson School	1,207	800	655
VTD: Mad. Co. Bap. Fam. Lf .Ct.	2,013	1,188	1,185
VTD: Magnolia Heights	1,916	1,308	1,006
VTD: New Industrial Park	577	378	315
VTD: Sharon	855	553	455
VTD: Tougaloo	605	584	581
VTD: Virlilia	532	369	173
Madison County Subtotal	**27,631**	**18,877**	**13,052**
Montgomery County	12,189	8,925	3,611
Quitman County	10,117	6,880	4,375
Sharkey County	6,580	4,409	2,833
Sunflower County	34,369	24,775	16,387
Tallahatchie County	14,903	10,427	5,666
Tunica County	9,227	6,324	4,062
Warren County	49,644	35,476	14,147
Washington County	62,977	43,144	25,780
Yazoo County	28,149	20,136	9,854
District 2 Subtotal	**711,164**	**501,887**	**297,121**
District 3			
Adams County	34,340	25,149	12,301
Amite County	13,599	10,068	3,967
Covington County	19,407	13,813	4,347
Franklin County	8,448	6,142	1,979
Hinds County			
VTD: 14	1,672	1,476	201

VTD: 17	853	694	40
VTD: 32	1,362	1,038	61
VTD: 33	1,252	934	16
VTD: 34	2,184	1,700	10
VTD: 35	2,401	1,773	160
VTD: 36	1,739	1,383	436
VTD: 37	1,636	1,306	420
VTD: 44	3,002	2,290	463
VTD: 45	2,789	2,281	76
VTD: 46	2,367	1,875	262
VTD: 78	4,337	3,674	433
VTD: 79	2,990	2,289	867
VTD: 8	1,412	1,211	143
VTD: 9	1,836	1,585	74
Hinds County Subtotal	**31,832**	**25,509**	**3,662**
Jasper County			
VTD: Bay Springs Beat 3	1,721	1,287	524
VTD: Bay Springs Beat 4	2,170	1,513	865
VTD: Garlandsville	105	81	43
VTD: Holders Church	1,366	1,003	546
VTD: Louin	1,234	862	424
VTD: Montrose	616	451	235
Jasper County Subtotal	**7,212**	**5,197**	**2,637**
Jefferson Davis County	13,962	9,998	5,269
Jones County			
VTD: Bruce	530	428	14
VTD: Centerville	504	375	2
VTD: Hebron	1,201	838	541
Jones County Subtotal	**2,235**	**1,641**	**557**

Kemper County	10,453	7,795	4,231
Lauderdale County	78,161	57,370	19,661
Lawrence County	13,258	9,635	2,859
Leake County			
VTD: Ebenezer	956	687	374
VTD: Edinburg	946	714	4
VTD: Freeny	1,368	958	86
VTD: Good Hope	1,044	776	197
VTD: Lena	861	625	325
VTD: Madden	996	741	87
VTD: Renfroe	608	465	60
VTD: Salem	758	569	65
VTD: Sunrise	669	507	22
VTD: Walnut Grove	1,373	973	540
Leake County Subtotal	**9,579**	**7,015**	**1,760**
Lincoln County	33,166	24,324	6,716
Madison County			
VTD: Bear Creek	2,461	1,749	500
VTD: Flora	1,756	1,301	349
VTD: Highland Colony Bap. Ch.	2,137	1,440	294
VTD: Lorman-Cavalier	1,531	1,148	409
VTD: Madison 1	1,651	1,149	19
VTD: Madison 2	3,585	2,582	63
VTD: Madison 3	3,853	2,658	173
VTD: Madisonville	427	323	81
VTD: Main Habor	1,953	1,574	51
VTD: Ratliff Ferry	1,075	795	410
VTD: Ridgeland 1	3,565	2,836	503
VTD: Ridgeland 3	3,990	3,138	1,027
VTD: Ridgeland 4	2,571	2,221	468
VTD: Ridgeland First Meth. Ch.	2,941	1,964	529
VTD: Ridegland Tennis Center	5,472	4,050	307
VTD: Smith School	499	380	39
VTD: Trace Harbor	1,820	1,277	34
VTD: Victory Baptist Church	3,788	2,449	69
VTD: Whispering Lake	1,968	1,383	128
Madison County Subtotal	**47,043**	**34,417**	**5,453**
Marion County			
VTD: Broom	831	590	202
VTD: Carley	1,389	1,016	128
VTD: Cedar Grove	820	573	167
VTD: Darbun	447	347	47
VTD: Foxworth	1,691	1,187	347
VTD: Goss	837	614	101
VTD: Kokomo	985	718	191
VTD: Morgantown	777	581	8
VTD: Pittman	919	669	7
VTD: Stovall	907	607	253
VTD: White Bluff	139	96	2
Marion County Subtotal	**9,742**	**6,998**	**1,453**
Neshoba County	28,684	20,583	3,609
Newton County	21,838	16,126	4,495
Noxubee County	12,548	8,697	5,751
Oktibbeha County	42,902	33,877	11,179
Pike County	38,940	28,154	12,331
Rankin County	115,327	85,452	13,901
Scott County	28,423	20,293	7,220
Simpson County	27,639	19,920	6,110

Smith County	16,182	11,731	2,354
Walthall County	15,156	10,853	4,242
Webster County			
VTD: Maben	750	528	138
Webster County Subtotal	**750**	**528**	**138**
Wilkinson County	10,312	7,648	4,992
Winston County			
VTD: American Legion	1,989	1,338	1,061
VTD: Bethany	242	186	21
VTD: Betheden-Loakfoma	363	278	87
VTD: Bond	915	673	164
VTD: Calvary	339	258	80
VTD: County Agent	1,792	1,188	941
VTD: Crystal Ridge	385	287	65
VTD: Dean Park	404	269	239
VTD: E.M.E.P.A.	1,357	1,007	266
VTD: Elementary School	834	610	285
VTD: Ellison Ridge	436	343	73
VTD: Fairground	2,044	1,583	579
VTD: Ford School	429	334	46
VTD: Hinze	69	52	1
VTD: Liberty	594	413	238
VTD: Lobutcha	292	206	96
VTD: Louisville Electric	224	158	40
VTD: Louisville High School	429	305	68
VTD: Lovorn Tractor	297	244	16
VTD: Mars Hill	343	262	43
VTD: Nanih Waiya	1,378	1,005	169
VTD: Nanih Waiya-Handle	573	410	86
VTD: New Hope	271	222	13
VTD: Noxapater	1,618	1,200	344
VTD: Old National Guard			

Armory	904	750	59
VTD: Sinai	369	276	147
VTD: Vowell	263	201	99
VTD: Zion Ridge	873	602	494
Winston County Subtotal	**20,026**	**14,660**	**5,820**
District 3 Subtotal	**711,164**	**523,593**	**158,994**
District 4			
Clarke County	17,955	13,147	4,185
Forrest County	72,604	54,801	16,378
George County	19,144	13,560	1,076
Greene County	13,299	10,088	2,768
Hancock County	42,967	32,163	1,975
Harrison County	189,601	140,213	26,665
Jackson County	131,420	95,072	17,952
Jasper County			
VTD: Antioch	614	456	48
VTD: Claiborne	617	449	213
VTD: Cooks Mill	770	527	468
VTD: Fellowship	234	181	54
VTD: Heidelberg	2,265	1,573	1,158
VTD: Midway	525	375	213
VTD: Mossville	1,452	1,058	235
VTD: Palestine	189	141	91
VTD: Philadelphia	578	425	297
VTD: Ras	147	113	61
VTD: Rose Hill	941	708	275
VTD: Stringer	1,660	1,266	74
VTD: Vossburg	945	608	543
Jasper County Subtotal	**10,937**	**7,880**	**3,730**

Jones County			
VTD: Anthonys Florist	927	582	414
VTD: Antioch (28067310)	596	472	0
VTD: Blackwell	135	93	3
VTD: Calhoun	3,275	2,525	43
VTD: Cameron Center	709	515	131
VTD: Cooks Ave. Comm Ctr.	878	626	608
VTD: County Barn	1,861	1,498	317
VTD: Currie	270	185	169
VTD: Ellisville Court House	1,507	1,216	254
VTD: Erata	642	485	233
VTD: Gitano	447	335	84
VTD: Glade School	1,932	1,480	24
VTD: Johnson	1,001	706	4
VTD: Lamar School	1,768	1,292	356
VTD: Landrum Comm. Ctr.	740	570	1
VTD: Laurel Courthouse	1,771	1,291	352
VTD: Maple Street YWCA	472	329	302
VTD: Mason School	2,078	1,668	39
VTD: Matthews	867	627	61
VTD: Moselle	1,820	1,351	185
VTD: Myrick	1,832	1,359	8
VTD: National Guard Armory	2,353	1,606	1,151
VTD: Nora Davis School	1,790	1,293	1,145
VTD: Oak Park School	1,805	1,109	1,078
VTD: Old Health Dept.	499	307	268
VTD: Ovett	1,301	954	12
VTD: Pendorf	646	493	14
VTD: Pinegrove	1,510	1,168	84
VTD: Pleasant Ridge	892	694	5
VTD: Powers Comm. Ctr.	1,595	1,158	233

VTD: Rainey	1,567	1,174	1
VTD: Roosevelt	601	427	323
VTD: Rustin	1,144	853	0
VTD: Sandersville Civic Center	1,390	1,044	92
VTD: Sandhill	924	716	1
VTD: Shady Grove	4,332	3,150	572
VTD: Sharon	3,508	2,604	375
VTD: Shelton	1,130	854	180
VTD: Soso	1,600	1,175	502
VTD: South Jones	1,357	1,047	191
VTD: Stainton	1,882	1,445	458
VTD: Tuckers	1,683	1,262	33
VTD: Twenty-Sixth St. Fire Stn	803	655	76
VTD: Union	1,216	902	28
VTD: West Jones	1,667	1,262	240
Jones County Subtotal	**62,723**	**46,557**	**10,650**
Lamar County	39,070	28,134	3,241
Marion County			
VTD: Balls Mill	1,071	806	169
VTD: City Hall Beat 3	828	598	205
VTD: Couthouse Beat 4	1,324	1,018	123
VTD: East Columbia	2,107	1,390	988
VTD: Hub	919	662	324
VTD: Jefferson Middle School	688	437	420
VTD: Morris	1,545	1,129	308
VTD: National Guard Beat 1	2,666	1,866	116
VTD: Pinebur	956	691	166
VTD: Popetown Beat 2	1,914	1,434	301

VTD: Sandy Hook	535	408	108
VTD: South Columbia	860	713	569
VTD: Union (28091103)	440	329	12
Marion County Subtotal	15,853	11,481	3,809
Pearl River County	48,621	35,515	3,927
Perry County	12,138	8,655	1,692
Stone County	13,622	9,966	1,777
Wayne County	21,216	15,014	5,112
District 4 Subtotal	**711,170**	**522,246**	**104,937**
State Totals	**2,844,658**	**2,069,471**	**685,259**

ANALYSIS OF FACTORS CONSIDERED

Population Equality

The United States Constitution requires a good-faith effort to ensure, as nearly as is practicable, that a State's congressional districts contain equal population. This court has made every effort to achieve absolute population equality without splitting voting precincts. The population deviation range is from +5 people in District 4 to -5 people in District 1. The effort to achieve population equality among the districts explains in significant part why some counties must be split.

Majority-Minority District

The Voting Rights Act requires that one congressional district be maintained in the State with an appropriate majority of black voting age residents. This district is represented on the map as District 2. Based on the figures from the 2000 Census, District 2 under the currently existing five-district plan has a black voting age population of 61%. Any significant variation in that percentage – up or down – constitutes retrogression of the voting rights of black residents of District 2 under § 5 of the Voting Rights Act. Under this court's redistricting plan, the black voting age population in District 2 is 59.20%. The effort to maintain the appropriate majority of black voting age citizens in District 2 further explains why some counties must be split.

Compactness

The court has attempted to achieve, as nearly as possible, four compact districts. The ability to create compact districts is limited by the distribution of population. Sparsely populated

districts necessarily will be less compact than heavily populated districts as a result of the population equality principle. Furthermore, a more compact plan cannot be drawn for two reasons: First, it would not be possible to prevent retrogression in District 2; and, secondly, it would be a barrier to including as much as possible of the currently existing districts 3 and 4 in the new District 3.

County and Municipal Boundaries

The plan splits eight counties: Hinds, Jasper, Jones, Leake, Madison, Marion, Webster, and Winston. We note that eleven counties are split under the currently existing five-district congressional plan adopted by the Mississippi Legislature in 1992. We attach a copy of that currently existing plan for reference.

In this court's plan today, Jasper and Marion Counties are split as part of the effort to maintain as much of currently existing district 4 in new District 3 as is feasible, subject to the constraints of population equality. Furthermore, Jasper County is split in a particular way to avoid splitting the town of Bay Springs. Hinds, Leake, and Madison Counties are split as part of the effort to prevent retrogression in District 2, as well as to help achieve population equality. Jones County is split so as not to remove the incumbent from his district and also to help achieve population equality. Webster County is split to avoid dividing the town of Maben, which lies partially in Oktibbeha County and partially in Webster County, among two districts. Winston County is split to help achieve population equality. The only municipality that is split is the City of Jackson. Mayor Johnson testified in Chancery Court that he preferred that the City be represented by two congressmen. In sum, the county splits are necessitated by: the population equality

requirement; preservation of the majority-minority district at an appropriate percentage; preservation of the cores of currently existing districts 3 and 4; and avoiding having incumbents districted out of their residences.

Historical and Regional Interests

The plan preserves as much as possible, given the constraints of population equality and § 5 of the Voting Rights Act, the cores of the Mississippi River/Delta region, East Central Mississippi, Southwest Mississippi, North Mississippi, and the Gulf Coast region.

Universities and Military Bases

The plan is drawn to assure that the 4 major research universities are also in separate districts. The military bases located in Lowndes, Lauderdale, and Harrison Counties are also in separate districts under this court's plan.

Growth Areas

The plan is drawn to provide that each district has at least one major growth area. District 1 contains DeSoto and Lee Counties, as under the currently existing five-district plan. District 2 contains the Nissan Plant/Gluckstadt area of Madison County, as it does under the currently existing five-district plan, and the Byram and Clinton areas of Hinds County, which are in district 4 under the currently existing five-district plan. District 3 contains southern Madison County and Rankin County. District 4 contains the Gulf Coast area.

Combination of Currently Existing Districts 3 and 4

In drawing District 3, consideration was given to including as much of the currently existing districts 3 and 4 in the new combined District 3 as possible. The new District 3 contains all or part of 14 counties from each of the currently existing districts 3 and 4, respectively.

The new District 3 includes the portion of Jones County which contains the incumbent's residence. It includes all or part of 14 of the 19 counties that comprise currently existing district 3: Jasper, Jones, Kemper, Lauderdale, Leake, Madison, Neshoba, Newton, Noxubee, Oktibbeha, Rankin, Scott, Smith, and Winston; however, it is necessary to eliminate: the portions of Attala County and Wayne County that are in currently existing district 3 for concerns of retrogression and population equality, respectively; and all of Clarke, Clay, and Lowndes Counties, primarily because of population equality.

The new District 3 includes all of Jefferson Davis County, which contains the residence of the incumbent for currently existing district 4. It includes all or part of 14 of the 15 counties that comprise currently existing district 4: Adams, Amite, Covington, Franklin, Hinds, Jefferson Davis, Jones, Lawrence, Lincoln, Marion, Pike, Simpson, Walthall, and Wilkinson; however, it is necessary to eliminate Copiah County for reasons of population equality with District 2 and to prevent retrogression of voting rights of black residents of District 2.

Protection of Incumbent Residences

No incumbent would be required to move in order to run in the district in which he resides.

Distance of Travel Within District

As is expected to occur when the number of districts is reduced from five to four, the distances of travel within the districts are increased. The distance of travel within District 1 is approximately the same size as under the plan submitted by the plaintiffs, and is substantially less than it is under the plan submitted by the intervenors. The new District 2 is slightly larger than currently existing district 2, but this is unavoidable in the light of the population deficit in currently existing district 2, which grew more slowly than any other district in the State. The distance of travel within new District 3 is dictated by the effort to combine currently existing districts 3 and 4, as well as by the effort to keep the four major research universities in separate districts. The distance of travel in new District 4 is slightly greater than it is in currently existing district 5. This is necessitated by the effort to include in District 3 as much of currently existing district 4 as is feasible. The distance of travel within new District 4 is substantially less than that within district 4 in the plan submitted by the plaintiffs.

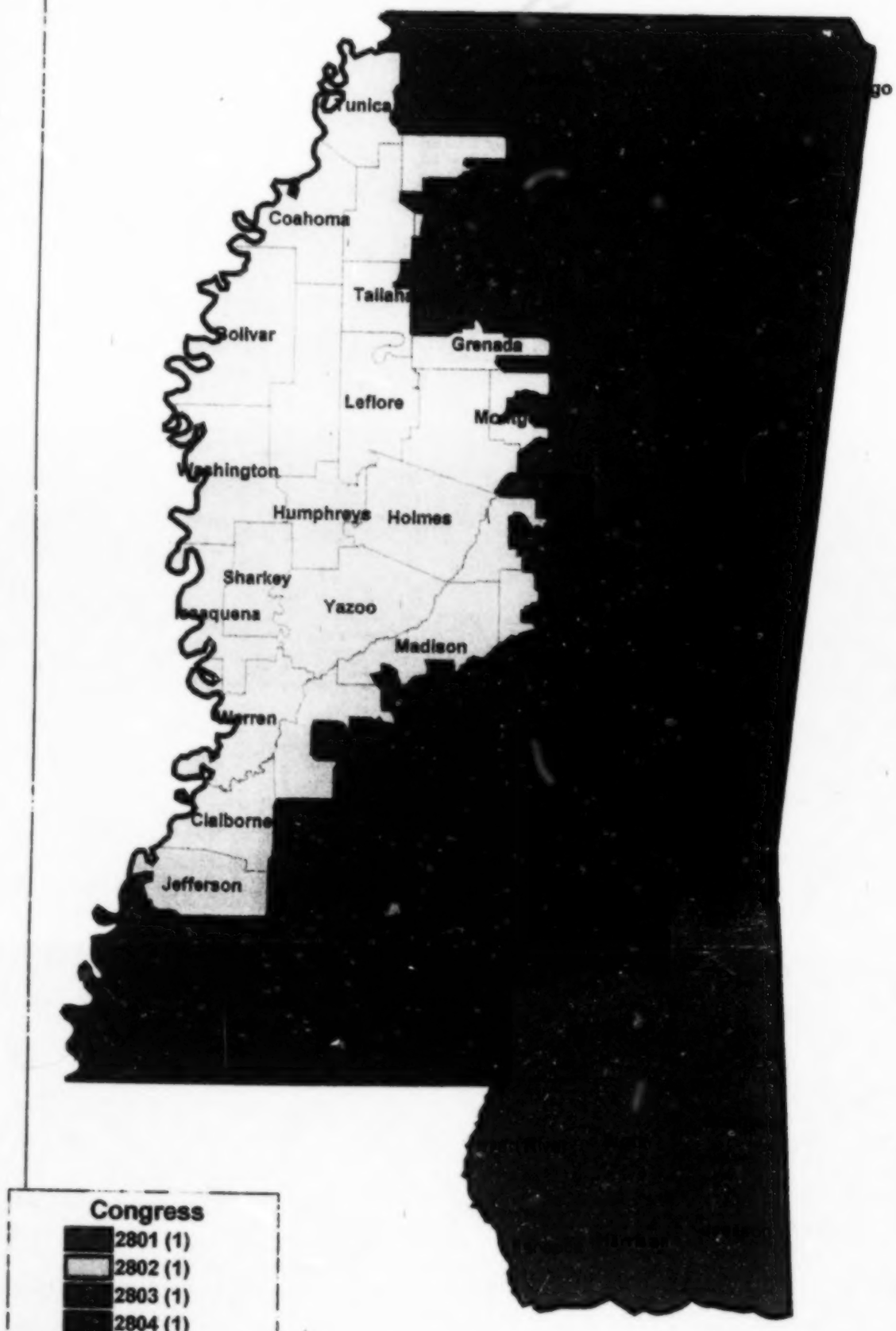
SUMMARY

In sum, the court has attempted to apply all appropriate neutral factors that are recognized by the United States Supreme Court and federal redistricting courts. As noted, these factors include, first, the constitutional demand for population equality among the districts, and secondly, the Voting Rights Act requirement that one equally populated district be drawn to include a majority of black residents of voting age. While respecting county, city and precinct lines and compactness of each district, the court sought to give appropriate value to the following factors: that District 3 should include as much as possible of the currently existing districts 3 and 4; that growth

areas, research universities and military bases should be placed in separate districts if otherwise practicable; that historical and regional interests should be respected; that no incumbent should be required to move; and that travel distances within the districts be as minimal as possible, consistent with the other requirements. When all feasible adjustments were made for these factors, further adjustments were necessary to satisfy one person-one vote requirements, and retrogression concerns.

BEST AVAILABLE COPY

Current Congressional Districts



APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN ROBERT SMITH,
SHIRLEY HALL, AND
GENE WALKER — PLAINTIFFS

V. — CIVIL ACTION NO. 3:01-CV-855WS

ERIC CLARK, Secretary of State
of Mississippi; MIKE MOORE,
Attorney General for the State
of Mississippi; RONNIE MUSGROVE,
Governor of Mississippi; MISSISSIPPI
REPUBLICAN EXECUTIVE COMMITTEE; AND
MISSISSIPPI DEMOCRATIC EXECUTIVE
COMMITTEE — DEFENDANTS

AND

BEATRICE BRANCH; RIMS BARBER;
L. C. DORSEY; DAVID RULE; JAMES
WOODARD; JOSEPH P. HUDSON; and
ROBERT NORVEL — INTERVENORS

(Filed Jan. 15, 2002)

ORDER

This matter is before us on the plaintiffs' motion for preliminary injunction as amended. In a previous order, we

deferred ruling on that motion until January 7, 2002, in order to give the State authorities an opportunity to timely carry out their duty to reapportion Mississippi's congressional districts. We recognize that the primary responsibility for reapportionment lies with the State and that if the State can timely reapportion itself in a constitutionally acceptable manner, federal courts have no duties to draw congressional districts. Because, for reasons that follow, it now appears uncertain whether the State authorities can have a redistricting plan in place by March 1, 2002 (the deadline to qualify for candidacy for the United States House of Representatives in Mississippi, *see* Miss. Code Ann. § 23-15-299), we conclude that it is necessary to assert our jurisdiction and to take under advisement the plaintiffs' motion for preliminary injunction, and, in response to plaintiffs' motion, we will begin to draft a plan for reapportioning Mississippi's congressional districts in order to assure that the congressional election schedule as provided under the laws of the State of Mississippi is timely implemented under a plan that satisfies both the requirements of the Constitution and § 5 of the Voting Rights Act. We begin by setting out the background facts.

I

As a result of the 2000 Decennial Census, the number of congressional representatives allotted to the State of Mississippi has been reduced from five to four. The attempts of the Mississippi Legislature to reapportion the State's congressional districts – a process that began some several months ago – have been unsuccessful.

In October 2001, the Intervenors in this case filed an action in the Chancery Court for the First Judicial District of Hinds County, Mississippi, against Mississippi's Secretary of State,

Attorney General, and Governor. The complaint alleged that the Legislative Standing Joint Congressional Redistricting Committee failed timely to submit Mississippi's new redistricting plan pursuant to Miss. Code Ann. § 5-3-129, and sought an injunction adopting and directing the implementation of a congressional redistricting plan.

On November 1, the plaintiffs, three Mississippi registered voters, filed this action in the United States District Court for the Southern District of Mississippi against the Mississippi Secretary of State, Attorney General, and Governor, as well as the Mississippi Republican Executive Committee and the Mississippi Democratic Executive Committee. The complaint alleged that Mississippi's districting plan dividing the State into five congressional districts cannot be enforced under federal law, and that any plan subsequently adopted by State authorities cannot be enforced until it has been precleared under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The plaintiffs sought injunctive relief to ensure that the State of Mississippi has a constitutional congressional redistricting plan in place in time to comply with the March 1, 2002 candidate qualification deadline. Specifically, the plaintiffs asked us to enjoin enforcement of the current congressional districting plan, Miss. Code Ann. § 25-15-1037, and to order that, in the 2002 congressional election, Mississippi's congressional representatives be chosen by the electors of the State at-large or, alternatively, that we adopt a new congressional redistricting plan.

This three-judge court was appointed by the Chief Judge of the United States Court of Appeals for the Fifth Circuit, The Honorable Carolyn Dineen King, and was convened pursuant to 28 U.S.C. § 2284, which provides that a district court of three judges "shall be convened when . . . an action is filed

challenging the constitutionality of the apportionment of congressional districts."

In an order dated November 19, 2001, the Chancery Court urged the Legislature and the Governor to renew their efforts to enact and implement a congressional redistricting plan as soon as possible. On December 3, the Chancery Court entered a scheduling order allowing the parties until the end of December to complete discovery and scheduling trial on January 14, 2002.

On November 30, 2001, we conducted a hearing on the plaintiffs' motion for preliminary injunction, the State defendants' motion to dismiss, and two motions for intervention. We entered an order on December 5, in which we granted the motion for leave to intervene filed by the plaintiffs in the Chancery Court action. Recognizing that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional . . . districts", *Emison v. Growe*, 507 U.S. 25, 34 (1993), we deferred ruling on the plaintiffs' motion for preliminary injunction so that State authorities might have further opportunity to timely carry out their duty to reapportion Mississippi's congressional districts. We stated, however, that if it was not clear by January 7, 2002, that the State authorities can have a redistricting plan in place by March 1, we would assert our jurisdiction and proceed expeditiously to rule on plaintiffs' motion for preliminary injunction and, if necessary, draft and implement a plan reapportioning the State's four congressional districts.

On December 7, the Chancery Court entered an amended scheduling order, ordering that discovery be completed by December 13, and moving the trial date up to December 14.

On December 13, the Mississippi Supreme Court denied

petitions for a writ of prohibition and a writ of mandamus filed by the State defendants and other petitioners challenging the Chancery Court's jurisdiction. In a two-page order, the Mississippi Supreme Court held that the Chancery Court had jurisdiction to conduct congressional redistricting and stated that "[a]ny congressional redistricting plan adopted by the chancery court . . . will remain in effect, subject to any congressional redistricting plan which may be timely adopted by the Legislature." The Court cited no authority and gave no explanation for its ruling. *In re Mauldin*, No. 2001-M-01891 (Miss. Dec. 13, 2001).

Trial commenced in the Chancery Court on December 14, and continued through December 18, with closing arguments on December 19. Eleven redistricting plans were submitted into evidence, and approximately twenty witnesses testified. The State defendants neither presented evidence, proposed any redistricting plans, nor participated at the trail. In a Opinion and Order issued on December 21, the Chancery Court adopted a plan as submitted by the plaintiffs (intervenors in this action). We are advised by the parties that the Chancery Court's judgment will be appealed to the Mississippi Supreme Court.

On December 17, the plaintiffs in this action moved for leave to amend their complaint and motion for preliminary injunction. The plaintiffs contend that the Chancery Court's entertaining of a congressional redistricting suit and the Mississippi Supreme Court's December 13 Order holding that the Chancery Court had jurisdiction constitute changes in practices and procedures with respect to voting, covered by the preclearance requirements of § 5 of the Voting Rights Act. The plaintiffs have asked us to enjoin the defendants from conducting any election using the current districting plan (which all parties agree is unenforceable), and to enjoin all actions to be taken pursuant to the Mississippi Supreme Court's

December 13 order and the Chancery Court's judgement until such time as both have been approved by federal authorities pursuant to § 5 of the Voting Rights Act. In addition, the plaintiffs asserted that, irrespective of whether the plan adopted by the Chancery Court is precleared by federal authorities, the Chancery Court's action violates Article I, § 4 of the United States Constitution, which provides that "The Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."[1] The plaintiffs contend that the Chancery Court's imposition of a redistricting plan usurps authority delegated to the Mississippi Legislature under Art. I, § 4. Finally, although they were not parties in the Chancery Court action, the plaintiffs assert that the Chancery Court violated the due process rights of parties to that action. The plaintiffs have requested that we order the election of congressional representatives by the electors of the State at-large, pursuant to Miss. Code Ann. § 23-15-1039 and 2 U.S.C. § 2a(c) (5) or, alternatively, that we devise a new, constitutional districting plan.

On December 26, 2001, the Attorney General of Mississippi submitted the Chancery Court judgment and the procedural orders of the Chancery Court and the Mississippi Supreme Court to the Attorney General of the United States for preclearance, and requested expedited consideration and

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[1] The remaining part of this sentence reads as follows: "but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." There is a specific federal statute giving federal courts jurisdiction over reapportionment matters. See 28 U.S.C. § 2284(a) ("A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.")

preclearance by January 31, 2002.

We conducted a hearing on the Plaintiffs' Motion for Leave to Amend and for Preliminary Injunction on December 28, 2001. In the light of the State defendants' acknowledgment that the current districting plan (dividing the State into five congressional districts) is unenforceable, and their further acknowledgment that the plan adopted by the Chancery Court cannot be implemented unless and until it is precleared by federal authorities, we directed the parties to file briefs on whether there remains a justiciable case or controversy before us.

For the reasons that follow, we conclude that this case is not moot, and that it is necessary to exercise our jurisdiction in order to ensure that an enforceable congressional redistricting plan is in place prior to the March 1, 2002 deadline for candidates to qualify for the 2002 congressional election.[2]

II

Historically, as provided by state and federal law, the Mississippi Legislature – not the state courts – has enacted congressional redistricting plans. *See* Miss. Code Ann. §§ 5-3-121, 5-3-123, 5-3-127, 5-3-129; U.S. Const. Art. I, § 4. Indeed, in 1932, the Mississippi Supreme Court held that state courts did not have jurisdiction over actions challenging congressional redistricting plans. *Brumfield v. Brock*, 169 Miss. 784, 142 So. 2d 745 (1932); *Wood v. Gillespie*, 169 Miss.

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[2] All of the parties seem to concede that there is a live controversy and that this court has jurisdiction to decide the issues that are presented, including implementing a redistricting plan, although whether, when and how we should exercise that jurisdiction is very much in dispute.

790, 142 So. 747 (1932).

The circumstances that gave rise to the present controversy – the Legislature's failure to reapportion the State's congressional districts – are addressed in Miss. Code Ann. § 25-15-1039, which was precleared by the United States Attorney General in 1986. It provides:

Should an election of representatives in congress occur after the number of representatives to which the state is entitled shall be changed, in consequence of a new apportionment being made by congress, and before districts shall have been changed to conform to the new apportionment, the representatives shall be chosen as follows: . . . if the number of representatives shall be diminished, then the whole number shall be chosen by the electors of the state at large.

Thus, the Mississippi Supreme Court's December 13 Order holding that the Chancery Court has jurisdiction to reapportion Mississippi's congressional districts as a matter of state law clearly appears to be a change in Mississippi's election procedures that must be precleared by federal authorities pursuant to § 5 of the Voting Rights Act. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969) (in § 5, "Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way"); *In re McMillan*, 642 So. 2d 1336, 1339 (Miss. 1994) (chancery court's enjoining of judicial primary elections "constitutes a change in voting standards, practices and procedures . . . subject to § 5 preclearance or approval . . . [that,] even if within the jurisdiction of the chancery court to grant, cannot be enforced without preclearance"). As we have noted, the State defendants at least implicitly acknowledge that this is a change in state law which must be precleared, because they have included the

Mississippi Supreme Court's Order in their submission to the Attorney General of the United States. Furthermore, at the December 28 hearing, the State defendants represented that they did not disagree with the Plaintiffs' interpretation of the Department of Justice regulations.

In addition, as acknowledged by the State defendants and the intervenors, the Chancery Court's judgment adopting a congressional redistricting plan is a change from the previous districting plan set forth in Miss. Code Ann. § 23-15-1037, and from the at-large plan set forth in Miss. Code Ann. § 23-15-1039 for circumstances such as the present ones. That change likewise cannot be enforced unless and until it is precleared under § 5. *See Connor v. Waller*, 421 U.S. 656 (1975). The State defendants have represented to us that they have no intention of taking any steps to administer, implement, or enforce the Chancery Court's districting plan until § 5 approval is obtained.

Although the State authorities have requested that their preclearance submission be given expedited consideration by the Attorney General of the United States, we have serious doubts whether the Mississippi Supreme Court's Order and the plan adopted by the Chancery Court pursuant to that order will be precleared prior to the March 1 candidate qualification deadline. In the first place, if the Chancery Court's judgment is appealed to the Mississippi Supreme Court, it is not at all clear that the Attorney General of the United States will act on the State's preclearance submission.[3] The regulations of the Department of Justice provide that, "with respect to a change

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[3] The Mississippi Republican Executive Committee has advised this court that it intends to appeal the Chancery Court's judgment to the Mississippi Supreme Court.

for which approval by . . . a State . . . court . . . is required, the Attorney General may make a determination considering the change prior to such approval if the change is not subject to alteration in the final approving action." 28 C.F.R. § 51.22(b).

We have no way of knowing whether the Mississippi Supreme Court will hear any appeal and, if it does, when it will render a decision.[4] Even if the Attorney General of the United States decides to consider the State's submission despite the pendency of an appeal of the Chancery Court's judgment, it is possible that either the Mississippi Supreme Court's Order or the plan adopted by the Chancery Court could be changed during the pendency of the preclearance proceeding. In determining that the Chancery Court had jurisdiction to conduct congressional redistricting, the Mississippi Supreme Court was ruling on petitions for a writ of prohibition and a writ of mandamus, and not deciding the merits of the case. Assuming it decides to hear an appeal of the Chancery Court's judgment, the Court may reconsider the issue of the Chancery Court's jurisdiction, or it may decide to place limits on that jurisdiction. It is also possible that the Court may make changes in the plan adopted by the Chancery Court. In either event, any such changes would have to be precleared by federal authorities, making it even more unlikely that a precleared plan will be in place prior to March 1.

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[4] It is uncertain whether the Mississippi Supreme Court will hear any appeal, inasmuch as the language of its December 13 order might be interpreted to mean that the Court has decided that the State's congressional districts should be reapportioned by a single Chancery Judge with no review by the State Supreme Court. The Mississippi Supreme Court stated: "Any congressional redistricting plan adopted by the chancery court in cause no. G-2001-1777 W/4 will remain in effect, subject to any congressional redistricting plan which may be timely adopted by the Legislature."

Even if we set aside our concerns about the lack of finality, the wide-ranging implications of the Mississippi Supreme Court's Order – giving a single chancery judge the power to reapportion the entire State's congressional districts, together with the possible absence of any appeal to a higher court – raise uncertainties whether the Order will be precleared. That broad grant of power presents quite serious concerns, including the potential for violations of § 2 of the Voting Rights Act. Furthermore, it is not at all clear that this change is not retrogressive with respect to minority voting rights, in the sense that redistricting decisions will depend on the individual views of an individual judge, elected by a small percentage of the State's voters. Furthermore, reapportionment questions arise in many contexts other than congressional redistricting – including redistricting of the Mississippi Legislature – and it is uncertain how far the reach of the chancery courts may now extend in all reapportionment matters. Consequently, it appears to us that, at the very least, the Attorney General of the United States will consider those implications very carefully, and might perhaps request more information from State authorities to clarify what is embodied in the change and the consequences thereof.

We very much appreciate that the United States Supreme Court has stated that "state courts have a significant role in redistricting." *Emison*, 507 U.S. at 33 (citing *Scott v. Germano*, 381 U.S. 407, 409 (1965)). These cases are highly relevant to the matters before us today. There are, however, distinctions to be made: *Germano*, the precedent cited for *Emison*, dealt exclusively with reapportionment of state legislative districts, not redistricting for the United States Congress, and neither of the states involved in *Emison* and *Germano* (Minnesota and Illinois) was subject to the preclearance requirements of § 5 of the Voting Rights Act. We

also note that in *Emison* the parties in the state court action had no control over the selection of the court in which their case was heard. Instead, the Minnesota Supreme Court appointed a special panel consisting of one appellate judge and two district judges to hear the case. 507 U.S. at 28. Although *Emison* (which dealt with both legislative and congressional redistricting and the reasoning is somewhat fused between the two) supports a conclusion that state courts have a role in congressional redistricting, as well as state legislative redistricting, the Court did not have before it, and thus did not consider, the effect of Article I, § 4 of the United States Constitution on congressional redistricting, which clause seems to designate congressional election matters to the legislature of a given state. Consequently, we have some uncertainty as to how *Emison* and *Germano* will be applied by the United States Attorney General in the context of a § 5 preclearance proceeding in a congressional redistricting case.

There is yet another reason why the Chancery Court 's adoption of a redistricting plan fails to assure that an approved plan will be in place by March 1: If the Mississippi Legislature chooses to act, the Mississippi Supreme Court has said that the Legislature's action will nullify the plan adopted by the Chancery Court. Should the Legislature act, any plan adopted by it would have to be precleared by federal authorities, and there are uncertainties as to whether such preclearance could be obtained before March 1 – although we acknowledge that there are fewer potential preclearance problems in a legislative plan than in the present court-ordered plan.

Finally, even if the Attorney General of the United States approves the changes submitted for preclearance, the plaintiffs in this action have challenged the authority of the state court to conduct congressional redistricting under Article I, § 4 of the

United States Constitution ("The Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."). The plaintiffs contend that Art. I, § 4 vests in state legislatures the power to conduct congressional redistricting, leaving no room for state courts to impose a redistricting plan as a matter of state, not federal, law. That question appears to remain for our decision, irrespective of whether the changes are precleared.

The State defendants and the Intervenors have suggested that there is no need for this court to act because no one intends to implement and enforce either the current districting plan (dividing the State into five congressional districts) or the plan adopted by the Chancery Court, absent preclearance. The State defendants and the Intervenors have suggested that the March 1 candidate qualification deadline is not set in stone and that it is not necessary that district lines exist on March 1. We are fully convinced, however, that such an election change would create confusion, misapprehension and burdens for the voters, for the political parties, and for the candidates. Many voters want to participate in the election process to a greater extent than mere voting. They want to personally know the candidates, to select their choice, to give money to their selection and to organize the people in their precincts or counties in the campaign for their choice. Given that all previous districts are being jumbled by the loss of one congressional representative, sorting out these new problems will take all the pre-primary time that the present statute allows. If we begin to delay the establishment of election districts and advance qualifying dates, such voters who want to become fully involved in the process will not timely know in which district they are going to be, and thus will not timely know where and with whom to become involved. The same situation will exist for the candidates. Postponing the election schedule means that

the candidates and political parties would encounter campaign and election burdens, that is, significant time constraints on getting acquainted with new voters, establishing organizations in new election districts and the multiple new precincts and counties therein, raising campaign funds within the new districts, developing strategies for particular geographic areas, etc. Indeed, postponing the election schedule is inconsistent with the position taken in the Mississippi Attorney General's preclearance submission, which requests expedited consideration in order to allow candidates and voters fully to understand the newly enacted district lines prior to the March 1 qualifying deadline. Furthermore, changing the March 1 date is inconsistent with the position taken by the Intervenors in their amended complaint filed in Chancery Court, in which they assert that, if a plan is not adopted in time for it to be implemented in advance of the March 1 deadline, "the interests of the plaintiffs and all Mississippi voters in enforcement of Mississippi's election laws will be compromised, and their rights under Mississippi law to participate in a congressional election process conducted in a timely manner will be violated." It is also significant to us that changing the deadline would also contravene the Mississippi Supreme Court's recognition of the importance of such deadlines under state election law. *See Adams County Election Comm'n v. Sanders*, 586 So. 2d 829, 832 (Miss. 1991) (an election schedule that violates the state election code is adverse to the public interest).[5]

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[5] The Intervenors ask us to wait until February 24 (the end of the sixty-day period within which the Attorney General of the United States may object to the State's submission) before exercising our jurisdiction. They seem to concede that, after that date, a plan from this court would be appropriate. We, of course, do not decide what course of action we will take if the Chancery Court's plan is approved on or before March 1. We are simply unwilling to wait until a point in time that would not provide ample

In sum, we agree with the State, the Intervenors, and the State Supreme Court that changing the dates of the election schedule would be deleterious to the rights of the voters, the candidates and the political parties, and accordingly we are determined to avoid such a change of dates. Therefore, because it now appears to be uncertain that the State authorities will have a redistricting plan in place by March 1, we will assert our jurisdiction. Accordingly, we will begin the process of drafting and implementing a plan for reapportioning Mississippi's congressional districts.

III

In concluding, we want to make this point absolutely clear: "The task of redistricting is best left to state legislatures, [which are] elected by the people and [are] as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies." *Abrams v. Johnson*, 521 U.S. 74, 101 (1997). *See also White v. Weiser*, 412 U.S. 783, 794 (1973) ("reapportionment is primarily a matter for legislative consideration and determination, [and] judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having an adequate opportunity to do so"). Although it may be difficult for the Legislature to adopt a plan at this late date, nothing in this order should be construed as in any way discouraging action by the Mississippi Legislature, to which the United States Constitution and the laws of Mississippi direct the primary responsibility for congressional redistricting. A precleared legislative plan is unequivocally to be preferred over a court-ordered plan, whether federal or state – and this is a

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time for our thorough consideration of the reapportionment issues presented in this case.

view consonant with the views of the Chancery Court and the Mississippi Supreme Court in this case. Without commenting on the ultimate role of the federal courts should the Legislature act, we encourage the Legislature to act. We should note that, if the Legislature should adopt a plan, it is much more likely to be precleared expeditiously than the plan adopted by the Chancery Court. This is true not only because the United States Constitution grants to state legislatures the duty and authority to enact legislation governing congressional elections, but also because such a plan would not have the potential preclearance encumbrances affecting the court-ordered plan, which we have noted earlier. And if the Legislature acts, and acts quickly, the 2002 congressional elections could be conducted on the basis of a plan emanating from the elected representatives of the people of Mississippi and not from this court. In the meantime, this court will begin the process of holding hearings to fashion a congressional reapportionment plan for the State to assure that the election process operates on schedule and without temporal change.

A ruling on the motion for preliminary injunction will come at a later date once all pending matters have been fully vetted. In accordance with this order, a scheduling conference is hereby set for 3:30 p.m. on Wednesday, January 16, 2002.

PLACE

DATE AND TIME

James O. Eastland U.S. Courthouse
Wednesday, January 16, 2002
Fourth Floor Courtroom
3:30 p.m.
245 East Capitol Street

Jackson, MS 39201

SO ORDERED, this 15th day of January, 2002.

/s/ E. Grady Jolly
E. GRADY JOLLY
United States Circuit Judge

/s/ Henry T. Wingate
HENRY T. WINGATE
United States District Judge

/s/ David C. Bramlette, III
DAVID C. BRAMLETTE, III
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN ROBERT SMITH,
SHIRLEY HALL, AND
GENE WALKER — PLAINTIFFS

V. — CIVIL ACTION NO. 3:01-CV-855WS

ERIC CLARK, Secretary of State
of Mississippi; MIKE MOORE,
Attorney General for the State
of Mississippi; RONNIE MUSGROVE,
Governor of Mississippi; MISSISSIPPI
REPUBLICAN EXECUTIVE COMMITTEE; AND
MISSISSIPPI DEMOCRATIC EXECUTIVE
COMMITTEE — DEFENDANTS

(Filed Dec. 5, 2001)

ORDER

This cause came on for hearing on November 30, 2001, on the Plaintiffs ' Motion for Preliminary Injunction, the State Defendants' Motion to Dismiss, the Motion of Richard Barrett to Intervene, and the Motion to Intervene of Beatrice Branch, et al. Having considered the pleadings, the briefs, and the arguments of counsel, we make the following rulings:

The Motion of Richard Barrett to Intervene is DENIED.

The Motion to Intervene of Beatrice Branch, et al., is GRANTED.

The State Defendants' Motion to Dismiss is DENIED.

Under the authority of *Emison v. Growe*, 507 U.S. 25, 34 (1993), we recognize that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional . . . districts." We do note, however, that after many months of work, the State authorities have been unable to produce a plan. In the light of *Emison*, a ruling on the Plaintiffs' Motion for Preliminary Injunction is hereby deferred, in order that State authorities may have further opportunity to timely carry out their duty.

We are, nevertheless, mindful of the fact that March 1, 2002, is the qualifying deadline for congressional candidates in Mississippi, and that any redistricting plan developed and adopted by State authorities must be submitted to the United States Department of Justice for preclearance. We are also mindful that the Department of Justice has sixty days to enter its objection to any plan adopted by the State authorities and if the Department of Justice objects to the plan, there is little or no possibility that the filing date of March 1 can be met. Furthermore, we think it imperative to have a plan in place by the qualifying deadline so that all election laws of the State of Mississippi can be met in a timely fashion in order to avoid candidate and voter confusion that results from the flux of delays, date changes, and continuances.

Accordingly, if it is not clear to this court by January 7, 2002 that the State authorities can have a redistricting plan in place by March 1, we will assert our jurisdiction and proceed expeditiously to rule on the Plaintiffs' Motion for Preliminary

Injunction, and if necessary, we will draft and implement a plan for reapportioning the state congressional districts. Finally, we note that because no preclearance with the Department of Justice is required for any plan that this three-judge federal district court implements, we do not have the same time constraints imposed on us as are imposed on the State under the Voting Rights Act.

SO ORDERED, this 5th day of December, 2001.

/s/ E. Grady Jolly
E. GRADY JOLLY,
CIRCUIT JUDGE

/s/ Henry T. Wingate
HENRY T. WINGATE,
UNITED STATES DISTRICT JUDGE

/s/ David C. Bramlette, III
DAVID C. BRAMLETTE, III
UNITED STATES DISTRICT JUDGE

APPENDIX G

Serial: 92338

IN THE SUPREME COURT OF MISSISSIPPI

No. 2001-M-01891

IN RE: CAROLYN MAULDIN, STACY SPEARMAN, DAVID MITCHELL, JAMES C. HAYS AND MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE — Petitioners

(Filed Dec. 13, 2001)

ORDER

This matter came before the Court sitting en banc on the Petition for Writ of Mandamus filed by Carolyn Mauldin, Stacy Spearman, David Mitchell, James C. Hays and the Mississippi Republican Executive Committee, the Response filed by Beatrice Branch, Rims Barber, L.C. Dorsey, David Rule, Melvin Horton, James Woodard, Joseph P. Hudson and Robert Norvel, the Petition for Writ of Prohibition filed by the State of Mississippi, the Supplemental Petition for Writ of Prohibition filed by Carolyn Mauldin, Stacy Spearman, David Mitchell, James C. Hays and the Mississippi Republican Executive Committee, the Supplement to Petition for Writ of Prohibition filed by the State, and the Responses filed by the Honorable Pat Wise and other respondents. Petitioners ask that this Court order that the Plaintiffs' Amended Complaint filed in cause no. G-2001-1777 W/4, Hinds County Chancery Court, be dismissed, or that cause no. G-2001-1777 W/4 be transferred to

Hinds County Circuit Court. Petitioners also ask that this Court stay the trial set in cause no. G 2001-1777 W/4 for December 14, 2001. After due consideration the Court finds that the Hinds County Chancery Court has jurisdiction of this matter. The Court further finds that the request to dismiss the Plaintiffs' Amended Complaint is denied. The Court further finds that the request to transfer this cause to circuit court is denied, as is the request for stay of the December 14, 2001, trial date. Any congressional redistricting plan adopted by the chancery court in cause no. G-2001-1777 W/4 will remain in effect, subject to any congressional redistricting plan which may be timely adopted by the Legislature.

IT IS THEREFORE ORDERED that the Petition for Writ of Mandamus filed by Carolyn Mauldin, Stacy Spearman, David Mitchell, James C. Hays and the Mississippi Republican Executive Committee be and the same is hereby denied.

IT IS FURTHER ORDERED that the Petition for Writ of Prohibition filed by the State of Mississippi be and the same is hereby denied.

IT IS FURTHER ORDERED that the Supplemental Petition for Writ of Prohibition filed by Carolyn Mauldin, Stacy Spearman, David Mitchell, James C. Hays and the Mississippi Republican Executive Committee be and the same is hereby denied.

IT IS FURTHER ORDERED that the Supplement to Petition for Writ of Prohibition filed by the State of Mississippi be and same is hereby denied.

SO ORDERED, this the 13th day of December, 2001.

/s/ Edwin Lloyd Pittman
EDWIN LLOYD PITTMAN, CHIEF JUSTICE
FOR THE COURT

Smith, P.J., would dismiss Plaintiffs' Amended Complaint, or in the alternative, transfer to circuit court.

Cobb, J., not participating.

APPENDIX H

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY,
MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER;
L.C. DORSEY; DAVID RULE; MELVIN HORTON;
JAMES WOODARD; JOSEPH P. HUDSON; and
ROBERT NORVEL PLAINTIFFS

V. No. G-2001-1777 W/4

ERIC CLARK, Secretary of State of
Mississippi; MIKE MOORE, Attorney General
of Mississippi; RONNIE MUSGROVE, Governor
of Mississippi DEFENDANTS

(Filed Dec. 31, 2001)

JUDGMENT

In accordance with the Opinion and Order entered on December 21, 2001, judgment is hereby granted in favor of the plaintiffs. Branch Plan 2A is adopted as the Court's redistricting plan as set forth in the appendix of the December 21, 2001 opinion, a copy of which is attached and incorporated hereto. If precleared under Section 5 of the Voting Rights Act, this plan shall govern the nomination and election of the United States House of Representatives from the State of Mississippi unless and until the Mississippi Legislature adopts a lawful plan that is precleared under Section 5. The state defendants are directed to submit the Court's plan for preclearance as required by the December 21, 2001 order. If the plan is

precleared, the state defendants are directed to take all necessary steps to implement the plan.

SO ORDERED AND ADJUDGED, this the 31st day of December, 2001.

/s/ Patricia D. Wise
CHANCERY COURT JUDGE

SUBMITTED BY COUNSEL FOR PLAINTIFFS

/s/ Carlton W. Reeves
CARLTON W. REEVES (MSB #8515)
PIGOTT REEVES JOHNSON & MINOR
ROBERT B. McDUFF (MSB # 2532)

APPENDIX I

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY,
MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER;
L.C. DORSEY; DAVID RULE; MELVIN HORTON;
JAMES WOODARD; JOSEPH P. HUDSON; and
ROBERT NORVEL PLAINTIFFS

V. No. G-2001-1777 W/4

ERIC CLARK, Secretary of State of
Mississippi; MIKE MOORE, Attorney General
of Mississippi; RONNIE MUSGROVE, Governor
of Mississippi DEFENDANTS

(Filed Dec. 31, 2001)

ORDER

This matter came on for hearing on the Motion of Intervenors and Mississippi Republican Executive Committee to Vacate or Amend Judgment and for Other Relief. After reviewing the pleadings submitted and the arguments of counsel, the Court hereby finds the motion not well taken and denies same in all respects.

SO ORDERED AND ADJUDGED, this the 31st day of December, 2001.

/s/ Patricia D. Wise
CHANCERY COURT JUDGE

SUBMITTED BY COUNSEL FOR PLAINTIFFS

/s/ Carlton W. Reeves
CARLTON W. REEVES (MSB # 8515)
PIGOTT REEVES JOHNSON & MINOR
ROBERT B. McDUFF (MSB # 2532)

APPENDIX J

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER;
L.C. DORSEY; DAVID RULE; MELVIN HORTON;
JAMES WOODARD; JOSEPH P. HUDSON; and
ROBERT NORVEL PLAINTIFFS

V. No. G-2001-1777 W/4

ERIC CLARK, Secretary of State of
Mississippi; MIKE MOORE, Attorney General
of Mississippi; RONNIE MUSGROVE, Governor
of Mississippi DEFENDANTS

CAROLYN MAULDIN, STACY SPEARMAN,
DAVID MITCHELL, and JAMES CLAY
HAYS, JR. INTERVENORS

(Filed Dec. 21, 2001)

OPINION AND ORDER

This cause came on for hearing before the Court on Plaintiffs' complaint for injunctive and other equitable relief. The Court, having considered all the motions and memoranda of law, having heard five (5) days of testimony and arguments, and having received into evidence and studied the exhibits offered and entered, is fully advised of all premises and hereby orders as follows:

I. Factual and Procedural Background

On October 5, 2001, the Plaintiffs in this proceeding filed a complaint naming the Secretary of State, Attorney General, and Governor (collectively, "State defendants") as proper party defendants. The complaint alleges *inter alia* that the Legislative Standing Joint Congressional Redistricting Committee failed to timely submit Mississippi's new redistricting plan by December 3, 2001, pursuant to Miss. Code Ann. Sec. 5-3-129 (Rev. 1991). The Plaintiffs seek an injunction "adopting and directing the implementation of a congressional redistricting plan." On October 7, 2001, the Plaintiffs amended their initial complaint, adding additional parties as Plaintiffs. On November 13, 2001, the State Defendants moved to dismiss the underlying lawsuits and Carolyn Mauldin, Stacy Spearman, David Mitchell, and James Clay Hayes, Jr. (collectively "Intervenors"), by and through counsel, moved this Court to be allowed to intervene in this action. On November 19, 2001, this Court allowed the Intervenors to participate in this action. After hearing oral arguments, receiving written briefs, and being fully advised on all premises, this Court denied the Defendants' Motion to Dismiss and the Defendants' subsequent Supplemental Motion to Dismiss. This Court denied the Intervenors' Motion to Dismiss on December 11, 2001.

On December 6, 2001, this Court allowed the State Defendants to add the Mississippi Republican and Democratic Executive Committees as Defendants. After careful reconsideration, the Court found that any additional parties involuntarily joined herein who choose not to submit themselves to the Court's jurisdiction would not serve the interest of the state authorities to proceed expeditiously. This joinder included voluntary participation in the Court's

Scheduling Order dated December 7, 2001.

Feeling aggrieved the Defendants and Intervenors petitioned the Mississippi Supreme Court for a Writ of Prohibition to prohibit this Court from proceeding with the triable issues of fact and law presented by Plaintiffs' complaint. The Defendants and Intervenors additionally sought a stay of the instant matter pending resolution of these issues on appeal. The Mississippi Supreme Court denied the Defendants' and Intervenors' Writ of Prohibition and Petitions for stay in all respects on December 13, 2001. The Supreme Court's order stated specifically the following:

> After due consideration, the Court finds that the Hinds County Chancery Court has jurisdiction of this matter. The Court further finds that the request to dismiss the Plaintiffs' amended complaint is denied. The Court further finds that the request to transfer this cause to circuit court is denied, as is the request for a stay of the December 14, 2001, trial date. Any congressional redistricting plan adopted by the chancery court in cause no. G-2001-1777W/4 will remain in effect, subject to any congressional redistricting plan which may be timely adopted by the Legislature.

In Re Maudlin, No. 2001-M-01891 (Miss. Dec. 13, 2001).

This Court commenced the evidentiary trial of this matter on December 14, 2001. Trial continued through Tuesday, December 18, 2001 with closing arguments being conducted Wednesday, December 19, 2001. During the course of the trial, eleven (11) redistricting plans were submitted and received into evidence. Approximately twenty (20) witnesses testified at the trial of this matter. The testimony offered in this matter shed

light on the contested issues involved in this litigation. However, the Court specifically notes that the State Defendants neither presented evidence, proposed any redistricting plans, nor participated in any fashion in these trial proceedings

II. Evaluation of Proposed Plans

While this Court recognizes its obligations that any plan of reapportionment must comply with the United States Constitution and the Voting Rights Act, this Court also recognizes the right of the State of Mississippi, by and through the Joint Standing Committee on Congressional Redistricting of the Mississippi Legislature, to adopt the State of Mississippi's individualized criteria for reapportionment. This criteria was several fold. First, the Redistricting Committee wanted to ensure that the population of each district was nearly equal as practicable. Second, the Committee desired the districts to be contiguous. Last, the Committee dictated that any plan of reapportionment must comply with both Sections 2 and 5 of the Voting Rights Act of 1965, as well as the United States Constitution. This Court also recognizes that any proposed redistricting plan must be evaluated in the light of the equitable principles of fairness and substantial justice.

A.Constitutional Requirements

The "one person, one vote" standard articulated in Article I, Section 2 of the United States Constitution guarantees the right of each citizen to an equal voice in the selection of a representative. *Wesberry v. Sanders*, 376 U.S. 1 (1964). Said another way, "one man's vote in a congressional election is to be worth as much as another's." *Id* at 8. As a result, the population within each state's congressional districts must be as nearly equal as practicable. *Id.* at 7-8. This requires a

good-faith effort to achieve precise mathematical equality. Any deviations from precise equality, no matter how small, must be individually justified, unless unavoidable. *See Karcher v. Daggett*, 462 U.S. 725 (1983).

"While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Wesberry*, 376 U.S. at 18. The Supreme Court more precisely refined the *Wesberry* standard:

> [T]he "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. *See Reynolds v. Sims*, 377 U.S. 533, 577 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance no matter how small.

Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969). More recently, the Supreme Court "reaffirm[ed] that there are no *de minims* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2, without justification." *Karcher*, 462 U.S. at 734.

The several plans submitted into evidence for this Court's consideration were as follows: (1) the plan passed by the Mississippi House of Representatives (Exhibit 4); (2) the plan passed by the Mississippi Senate (Exhibit 8); (3) Branch Plaintiffs' plan 1 (Exhibit 15); (4) Branch plan 2 (Exhibit 20); (5) Branch plan 1A (zero deviation) (Exhibit 38); (6) Branch plan 2A (zero deviation) (Exhibit 40); (7) Original Kirksey plan

(Exhibit 44); (8) Kirksey plan 2 (Exhibit 47); (9) Modified Kirksey plan (Exhibit 49); (10) Kirksey plan 2-no deviation (Exhibit 48); and (11) Modified Kirksey plan-no deviation (Exhibit 50). While the Court recognizes that eleven plans were introduced into evidence, at trial the parties basically advanced two plans in support of their respective positions. The Plaintiffs urged this Court to adopt Branch plan 2A with zero population deviation. On the other hand, the Intervenors urged adoption of the modified Kirksey plan with no deviation in the population.

The House plan has a total deviation of 0.02%. The Senate plan has a total deviation of 0.07%. These minor deviations apparently exist only because of the effort to avoid splitting precincts. While such minor deviations may be appropriate in a legislative plan, a court-ordered plan should contain districts with populations as equal as practicable to fully satisfy the exacting federal constitutional standards regarding deviation in congressional plans. The Branch and Kirksey plans have been altered so that the deviation is zero.

Here, both parties have presented plans, which have been described as providing "zero deviation" or "no deviation" from equality. The State of Mississippi has 2,844,658 inhabitants according to the 2000 census. Divided by four, this results in a figure of 711,164.5. Thus, a deviation as low as possible will lead to two districts with 711,164 people and two districts with 711,165 people. The Branch plan 2A and the modified Kirksey plan do this. The maximum population deviation in any district under the Court's plan is one person. That deviation was unavoidable because Mississippi's total population is not divisible by four.

B. Voting Rights Act

Federal law also places constraints upon state plans for congressional redistricting through the provisions of the Voting Rights Act. The requirements of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, are clear. Because the application of § 2 to this case has neither been pled nor proven by any party, this Court determines that § 2 has not been violated by any of the plans submitted for the Court's consideration.

Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, forbids changes in state election laws which "have the effect of denying or abridging the right to vote on account of race or color." This Court has complied with the redistricting guidance recently issued by the Department of Justice. Its published standards declare:

> A proposed redistricting plan ordinarily will occasion an objection by the Department of Justice if the plan reduces minority voting strength relative to the benchmark plan and a fairly-drawn alternative plan could ameliorate or prevent that retrogression.

Office of the Assistant Attorney General, Civil Rights Division; Guidance Concerning Redistricting and Retrogression under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, 66 Fed Reg. 5412, 5413 (Jan. 18, 2001). In determining reduction in voting strength, the Department of Justice is guided by the most recent census data.

> For redistricting after the 2000 Census, the Department of Justice will, consistent with past practice, evaluate redistricting submissions using the 2000 Census population data released by the Bureau

> of the Census for redistricting pursuant to Public Law 94-171, 13 U.S.C. 141(c).

Id. at 5414.

Both plans that the parties have urged for adoption have retrogression in the majority-minority District 2. The 2000 census indicates that existing District 2 has a Black voting age population of 61.1 percent. *See* Exhibit 26, Population Summary Report. Under the Branch plan 2A, the Black voting age population is 59.03 percent. The modified Kirksey plan gives District 2 a Black voting age population of 59.94 percent. The difference in the deviation of the Black voting age population between the Branch plan 2A and the modified Kirksey plan is of no consequence in this Court's opinion since the majority-minority status of District 2 is not affected. Thus, the Court finds that retrogression is not an issue in either plan and that both plans satisfy Section 5 of the Voting Rights Act.

C. Non Constitutional Considerations

The Court acknowledges several non constitutional considerations urged by the Intervenors. However, the Court also acknowledges the criteria of the Joint Standing Committee on Congressional Redistricting as testified to by its attorney, Tommie Cardin, and the general principles of equity.

The neutral criteria that has evolved in the federal line of cases regarding redistricting are as follows: (1) providing geographically compact and contiguous districts; (2) adhering to traditional and historic regional and district boundaries; (3) preserving communities of interest; and (4) avoiding unnecessary or invidious outdistricting of incumbents. *Balderas v. Texas*, No. 6:01CV158 (E.D. Tex. Nov 14, 2001),

slip op.

1. Geographically compact and contiguous districts

Under the federal line of cases, a court may consider whether the districts are geographically compact and contiguous. Each plan urged by the Plaintiffs and the Defendants provides contiguous districts. Therefore, contiguity of the districts is not an issue.

The Court next must consider the geographical compactness of the districts within the plans. The Court finds it informative that the Intervenors' expert witness, Dr. John Alford, under cross examination, admitted that compactness is not a federal requirement that states are bound to respect during the redistricting process. At first glance, the modified Kirksey plan may appear more attractive. However, this Court must evaluate the plans beyond the mere appearances. Looks can be deceiving.

As noted earlier, contiguity, not compactness, was one of the three criteria announced by the Joint Standing Committee on Congressional Redistricting. The Court further notes that the current legislative plan is not compact. Therefore, this criteria, taken in conjunction with the testimony of the Intervenors' expert, Dr. John Alford, and the Court's equity principles of fairness, leads this Court to the conclusion that compactness is not a priority for redistricting in the State of Mississippi. This Court rejects the Intervenors' arguments regarding the neutral consideration of compactness.

2. Traditional and Historic Regional Boundaries

The Branch plan 2A preserves the historical boundaries of Districts 3 and 4, while the modified Kirksey plan completely dismantles District 4. This, the Court finds disturbing. According to the testimony of former Congressman Wayne Dowdy, a successful candidate in District 4, "traditionally, there has been a congressional district that included Southwest Mississippi going back for decades and decades. The Southwest part of the State has been traditionally a seat in Congress." The former Congressman goes on to state "the modified Kirksey plan splits [District 4] into three parts and tacks one onto the coast, one onto the Delta district and one onto the third district. . . . It's ugly insofar as Southwest is concerned." While the Court disregards the comments on the appearance of the district, the Court found Representative Dowdy's testimony instructive with regard to the traditional and historic boundaries of the district. The Court notes that under the current congressional districts, the four major universities are in different districts. The Court further notes that the two military bases placed together in the Branch plan 2A are also placed together in the current congressional district.

The Court finds that in contrast with the modified Kirksey plan, the Branch plan 2A preserves the integrity of a Southwest Mississippi district, and it places the electorate of Southwest Mississippi in a position where it would not be ignored. The Court notes that in the interest of preserving historical boundaries, that the Branch plan 2A most closely resembles current Districts 3 and 4.

3. Communities of Interest

While the Court recognizes that communities of interest is a non constitutional consideration, this Court will address this issue. This Court rejects the argument that placing high growth areas in the same district would jeopardize federal funding to those cities. Conversely, the Court's opinion is that it would do just the opposite since the person representing District 1 will have the opportunity to concentrate on the common issues of larger cities, much like former Congressman Sonny V. Montgomery who championed in the area of veteran and military affairs. Congressman Montgomery was able to accomplish these goals although two military bases were located in the district.

Under the Branch 2A plan, the Intervenors assert that the plan places Desoto, Lee, and parts of Rankin and Madison Counties all in proposed District 1, and that in fact, there would be counties in competition. It is this Court's opinion that these counties in fact are high growth areas. Additionally, they are all primarily bedroom communities and have had extensive suburban growth. They all outline large metropolitan areas and have access to the best transportation system that this State has to offer, with a transportation artery of 1-55 and accessibility to major airports. This Court would agree that common interests may yield common problems. Fortunately, these problems and interests can be addressed in a like and similar manner. This would give any person representing this district an opportunity to focus on issues that would be common to high growth areas within the district and in the State of Mississippi.

Regarding the issue of competition, this Court is persuaded by the testimony of former Congressmen Wayne Dowdy and Bob Livingston. Both witnesses agreed that the State

Congressional delegation should work and have worked well together for the benefit of the State of Mississippi in securing federal funding. Congressman Dowdy stated that even though there may be competition for federal dollars, "[t]here's no way Rankin County with that huge mass of population and that huge tax base will ever be ignored by anybody." Additionally, the Court emphasizes that the present District 1 representative is a member of the powerful House Appropriations Committee. Further, this Court weighed the testimony of Bob Livingston, former Chairman of the House Appropriations Committee. Congressman Livingston said that it is preferable to place high-growth areas in separate congressional districts for purposes of lobbying for federal money. He also testified that no matter where the high-growth areas are situated, the state's delegation ultimately must work together. He stated that all members of the state's delegation must work through the member or members who happen to be on the Appropriations Committee, which in Mississippi's case is Congressman Roger Wicker of District 1. Congressman Livingston testified that Congressman Wicker does a good job of balancing the appropriations needs of the entire State of Mississippi; likewise, Senators Trent Lott and Thad Cochran do a good job of balancing the state's needs and obtaining federal appropriations. Finally, Congressman Livingston testified that redistricting involves many factors other than the appropriations process.

"The community of interest concept could be employed in every congressional district across the country in which a congressional incumbent feels threatened by an impending redistricting." *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 660 (N.D. Ill. 1991). This Court is of the opinion, like in *Hastert*, "that there is a place where particular non constitutional communities of interest should be considered . .

. [and] [t]hat place is the halls and committee chambers of the State legislature." *Id.* "The courtroom is not the proper arena for lobbying efforts regarding the districting concerns of local, non constitutional communities of interest." *Id.* After careful consideration, this Court rejects the Intervenors' communities of interest arguments.

4. Treatment of Incumbents

The next issue this Court will address is the equitable treatment of the two incumbents. First, this Court is mindful of the reason we are here today – the State of Mississippi is losing one of its congressional districts because the population of the State did not grow at the national rate. After reviewing the population of each current congressional district, it makes logical sense to combine the two slowest-growth, non constitutionally protected districts. Said another way; it is only equitable to combine the current Districts 3 and 4, since due to their slower growth rate, Mississippi is having to reduce its congressional delegation from five to four.

With this in mind, the Court is faced with drawing one congressional district out of two that is equitable and fair under the circumstances. The maintenance of incumbents provides the electorate with some continuity. However, this Court has not and will not concern itself with mere partisan politics. The true purpose of the redistricting process is to afford the electorate orderly, timely, and efficient elections without the flux of delays, date changes, and continuances. The Court finds most instructive Dr. Alford's testimony that the judiciary should not consider politics as a criterion when courts are required to act in the legislature's stead as it relates to redistricting.

Combining Districts 3 and 4 into a single district that is equitable for both incumbents is a difficult task. Both the House and Senate plans combine portions of existing Districts 3 and 4 into a single district. Although the two plans are different, each contains a combined district linking Southwest Mississippi to East Central Mississippi. Congressman Chip Pickering presently represents District 3, and District 4 is represented by Congressman Ronnie Shows. For purposes of this equitable analysis, the political affiliations of Congressmen Pickering or Shows are irrelevant. These gentlemen are the two most junior members of the Mississippi delegation. Under the present congressional scheme, their districts adjoin each other.

Like the Senate and House plans, the Branch 2A plan also contains a combination district linking Southwest Mississippi with East Central Mississippi. The modified Kirksey plan does not. The combined District 3 in the modified Kirksey plan is fully anchored in East Central Mississippi. It contains all or part of eighteen of the nineteen counties that are fully or partially in the existing District 3. By contrast, the modified Kirksey plan contains all or part of only five of the fifteen counties fully or partially in the existing District 4. The other ten counties wholly or partially in present District 4 are divided elsewhere, with five going to proposed District 2 and five to proposed District 4. Thus; under the modified Kirksey plan, the present District 4 is completely dismantled. Again, the Court finds this disturbing.

The population analysis presented by the Plaintiffs indicates that in the modified Kirksey plan, 73% of the proposed District 3 comes from existing District 3, while only 20% comes from existing District 4. Portions of each of current Districts 1, 2, 3, and 5 compose at least 60% of one of the new districts. Current District 4, however, is completely

fragmented. The Senate plan suffers from the same problem. The population analysis shows that 62% of the proposed District 3 in that plan comes from the present District 3, while only 34% comes from present District 4. The House plan contains a combination district that is composed of roughly equivalent portions of present Districts 3 and 4.

The Branch plan 2A contains a balanced combination district. Forty-seven percent of the proposed District 3 in the Branch plan comes from present District 3, and 44% comes from present District 4. Most of the remaining 9% come from present District 1, which is represented by Congressman Roger Wicker. The combination district in the Branch plan 2A allows for a level playing field for the incumbents. The plaintiffs' expert, Dr. Leslie McLemore, Professor of Political Science at Jackson State University and a noted authority on Mississippi politics, testified as an expert. Dr. McLemore's testimony substantiated that under the Branch plan 2A, a congressional race between the incumbents Ronnie Shows and Chip Pickering would be competitive, and either candidate's chances of winning were more equalized under the Branch plan 2A than the modified Kirksey plan. Dr. McLemore's testimony was not refuted on this issue.

When a court adopts a redistricting plan, fairness to the incumbents is a paramount consideration. This is particularly true where a seat is lost and incumbents must be pitted against one another. This Court is of the opinion that the fundamental principles of equity as they relate to the incumbents dictate adoption of the Branch plan 2A.

III. Conclusion

Ultimately, the key issue is equity. This problem was

caused by the loss of a seat. The resolution must be one that is fair. After meeting the constitutional and Voting Rights Act requirements, the plan ordered by this Court should be based on the equitable principles of fairness.

Rather than reaching some sort of compromise between existing Districts 3 and 4, the modified Kirksey plan totally dismantles and fragments District 4. The Branch plan 2A best achieves the goals of fairness. It contains features of both the House and Senate plans, and effects a compromise. *Cf., Ajamian v. Montgomery County*, 639 A.2d 157, 170 (Md. App. 1994) ("Redistricting is both an art and a science; it is by its very nature founded on compromise and accommodation"). It adheres to state redistricting policies to the extent possible while also attempting to achieve fairness. *See, Cook v. Luckett*. 735 F 2d 912, 918 (5th Cir. 1984) ("A court must honor state policies to the greatest extent possible when choosing among available plans or fashioning its own.").

IT IS THEREFORE ORDERED AND ADJUDGED, that the Branch plan 2A be and is hereby adopted as the Court's redistricting plan as set forth in the Appendix, and said plan shall govern the nomination and election of members of the House of Representatives from the State of Mississippi; and

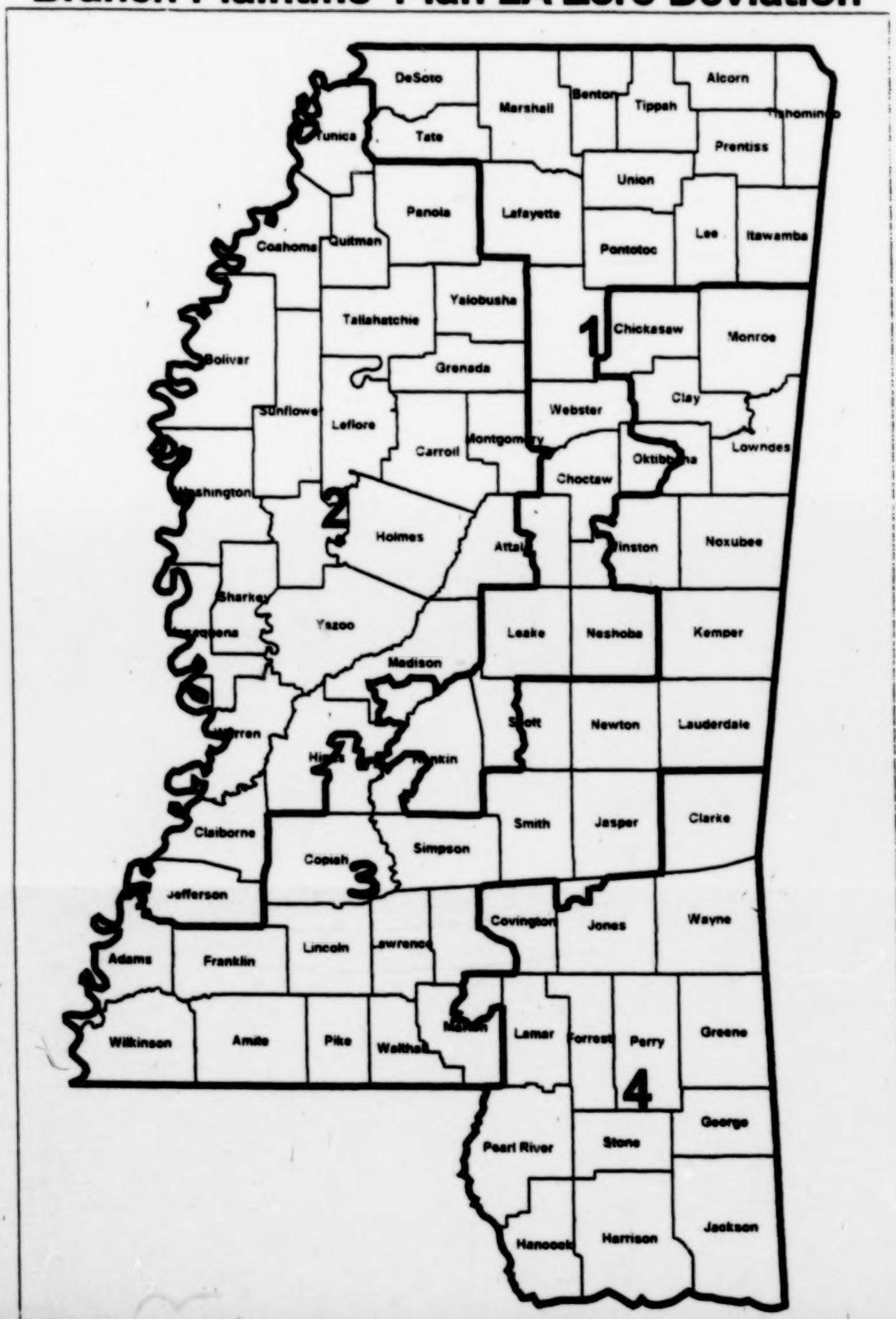
IT IS FURTHER ORDERED AND ADJUDGED, that the State Board of Elections, in accordance with its duties under the Mississippi Election Laws shall forthwith implement the terms of the Court's redistricting plan by filing said plan with the Department of Justice on or before December 26, 2001, by 5 o'clock eastern standard time and by filing a certificate of compliance with this Court on or before December 26, 2001, by 5 o'clock central standard time.

The Clerk of the Chancery Court is hereby directed to enter this final judgment in accordance with the Order set forth above.

SO ORDERED, this 21st day of December, 2001.

/s/ Patricia D. Wise
CHANCELLOR

Branch Plaintiffs' Plan 2A Zero Deviation



Summary Report

Branch Plaintiffs' Plan 2A Zero Deviation

District	Population	Deviation	% Dev.	Total Voting Age Population (VAP)	AP Black VAP	% AP Black VAP
1	711,165	0	0	525,680	94,243	17.93
2	711,165	0	0	502,604	296,696	59.03
3	711,164	-1	0	519,152	194,829	37.53
4	711,164	-1	0	522,035	103,226	19.77
Totals:	2,844,658	1	0	2,069,471	688,994	33.29

Plan: Branch Plan 2A Zero Deviation
Plan Type:
Administration:
User:

Plan Components Report

Wednesday, December 19, 2001 11:57 AM

	Population	[18+ Pop]	[18+ AP Blk]
District 1			
Alcorn County	34,558	26,310	2,663
Attala County			
VTD: Berea	217	170	26
VTD: Ethel	842	614	201
VTD: Liberty Chapel	470	351	78
VTD: McCool	597	466	146
VTD: Providence	516	407	37
VTD: Thompson	269	200	12
VTD: Zama	561	418	117
Attala County Subtotal	**3,472**	**2,626**	**617**
Benton County	8,026	5,867	1,949
Calhoun County	15,069	11,270	2,904
Choctaw County	9,758	7,044	1,941
DeSoto County	107,199	77,005	58,132
Itawamba County	22,770	17,257	1,074
Lafayette County	38,744	31,170	6,955
Leake County	20,940	15,308	5,333
Lee County	75,755	54,793	11,974
Madison County			
VTD: Bear Creek	2,461	1,749	501

VTD: Cobblestone Church Of God	5,472	4,050	311
VTD: Gluckstadt			
BLK: 0302041004	2	2	0
BLK: 0302041005	159	128	4
BLK: 0302041006	59	46	4
BLK: 0302041007	0	0	0
BLK: 0302041019	8	5	0
BLK: 0302041020	88	58	2
BLK: 0302041021	59	43	0
BLK: 0302041022	3	3	0
BLK: 0302041023	89	53	3
BLK: 0303011000	13	9	7
BLK: 0303011001	626	549	30
BLK: 0303011002	101	52	0
BLK: 0303011003	23	13	0
BLK: 0303011004	95	58	7
BLK: 0303011005	72	45	8
BLK: 0303011006	242	167	30
BLK: 0303011007	477	323	56
BLK: 0303011008	285	178	45
BLK: 0303011009	98	62	6
BLK: 0303011010	25	22	8
BLK: 0303011011	0	0	0
BLK: 0303011012	14	10	0
BLK: 0303011013	0	0	0
BLK: 0304002048	0	0	0
BLK: 0304002049	0	0	0
BLK: 0304002052	12	6	6
BLK: 0304002072	16	12	12
BLK: 0304002120	6	4	0
BLK: 0304002121	32	32	0
BLK: 0304002122	54	46	4

BLK: 0304002123	0	0	0
BLK: 0304002124	0	0	0
BLK: 0304002125	15	12	0
BLK: 0304002126	3	2	0
BLK: 0304002127	7	7	0
BLK: 0304002128	0	0	0
BLK: 0304002129	7	6	0
BLK: 0304002130	30	29	0
BLK: 0304002131	11	11	0
BLK: 0304002132	14	10	0
BLK: 0304002133	0	0	0
BLK: 0304002134	0	0	0
BLK: 0304002135	0	0	0
BLK: 0304002136	0	0	0
BLK: 0304002137	2	2	0
BLK: 0304002162	0	0	0
BLK: 0304002163	0	0	0
BLK: 0304002164	0	0	0
BLK: 0304002165	0	0	0
BLK: 0304002166	0	0	0
BLK: 0304002167	6	6	0
BLK: 0304002168	0	0	0
BLK: 0304002169	0	0	0
BLK: 0304002170	2	2	0
BLK: 0304002172	33	25	1
BLK: 0304002185	23	20	0
BLK: 0304002186	45	43	0
BLK: 0304002187	56	50	1
BLK: 0304002188	0	0	0
BLK: 0304002189	3	2	0
BLK: 0304002190	38	27	6
BLK: 0304002191	4	4	0
BLK: 0304002192	3	2	0
BLK: 0304002193	12	7	0

BLK: 0304002194	1	1	0
BLK: 0304002195	5	3	0
BLK: 0304002196	0	0	0
BLK: 0304002197	0	0	0
BLK: 0304002198	15	12	11
BLK: 0304002199	339	235	50
BLK: 0304002200	18	11	2
BLK: 0304002201	19	14	0
BLK: 0304002270	4	2	0
BLK: 0304002274	0	0	0
BLK: 0304002275	24	22	20
BLK: 0304002276	15	12	0
BLK: 0304002988	0	0	0
BLK: 0304002989	0	0	0
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BLK: 0304002992	0	0	0
BLK: 0304002993	0	0	0
BLK: 0304002994	0	0	0
BLK: 0304002995	0	0	0
BLK: 0304002996	0	0	0
BLK: 0304002997	0	0	0
BLK: 0304002998	0	0	0
VTD Gluckstadt Subtotal	**3,412**	**2,505**	**323**
VTD: Highland Colony Bap. Ch.	2,137	1,440	294
VTD: Madison 1	1,651	1,149	19
VTD: Madison 2	3,585	2,582	65
VTD: Madison 3	3,853	2,658	173
VTD: Madisonville	427	323	82
VTD: Main Harbor	1,953	1,574	53
VTD: Ridgeland 1	3,565	2,836	510

VTD: Ridgeland 3	3,990	3,138	1,033
VTD: Ridgeland 4	2,571	2,221	474
VTD: Ridgeland First Meth. Ch.	2,941	1964	531
VTD: Trace Harbor	1,820	1,277	34
VTD: Victory Baptist Church	3,788	2,449	69
VTD: Whisper Lake	1,968	1,383	128
Madison County Subtotal	**45,594**	**33,298**	**4,600**
Marshall County	34,993	25,695	12,241
Neshoba County	28,684	20,583	3,647
Oktibbeha County			
VTD: Adaton	861	612	141
VTD: Bradley	330	253	58
VTD: Craig Springs	262	202	7
VTD: Double Springs	492	386	18
VTD: Maben	677	465	216
VTD: North Longview	982	732	134
VTD: Self Creek	624	482	68
VTD: South Longview	427	320	69
VTD: South Starkville	7,044	5,813	1,235
VTD: Sturgis	1,327	996	261
VTD: West Starkville	4,838	3,722	920
Oktibbeha County Subtotal	**17,864**	**13983**	**3,127**
Pontotoc County	26,726	19,351	2,543
Prentiss County	25,556	19,170	2,352
Rankin County			
VTD: Antioch	356	262	9
VTD: Castlewoods	6,303	4,600	432

VTD: Cato	1,375	964	242
VTD: Crest Park	2,890	2,096	123
VTD: Crossroads	1,121	816	66
VTD: Cunningham Heights	1,552	1,150	87
VTD: Dry Creek	1,785	1,267	426
VTD: East Brandon	1,580	1,174	106
VTD: East Crossgates	3,238	2,432	44
VTD: Eldorado	3,122	2,417	369
VTD: Fannin	4,067	2,913	419
VTD: Flowood	1,473	1,243	161
VTD: Grants Ferry	4,142	2,890	140
VTD: Holbrook	4,525	3,390	277
VTD: Johns	763	570	90
VTD: Leesburg	1,255	911	113
VTD: Mayton	344	227	58
VTD: Mullins	1,088	746	429
VTD: North Brandon	4,300	3,167	297
VTD: North McLaurin	1,879	1,410	63
VTD: North Pearson	503	381	41
VTD: North Richland	2,141	1,630	122
VTD: Northeast Brandon	1,272	880	302
VTD: Oakdale	1,289	920	58
VTD: Patton Place	1,702	1,255	141
VTD: Pearl	1,624	1,203	59
VTD: Pelahatchie	3,708	2,706	636
VTD: Pisgah	2,301	1,603	713
VTD: Puckett	1,220	870	212
VTD: Reservoir	4,468	3,512	90
VTD: Shiloh	323	239	78
VTD: South Brandon	2,289	1,672	46
VTD: South Crossgates	1,574	1,366	67
VTD: South McLaurin	2,694	1,994	69
VTD: Star	1,675	1,248	270
VTD: West Crossgates	2,184	1,662	92

VTD : West Pearl	3,351	2,449	428
Rankin County Subtotal	**81,476**	**60,235**	**7,375**
Scott County			
VTD: Clifton	208	140	18
VTD: Contrell	752	481	354
VTD: Cooperville	541	424	26
VTD: East-West Morton	3,146	2,331	509
VTD: Forkville	398	314	8
VTD: Liberty (28123405)	1,068	752	142
VTD: Ludlow	815	608	165
VTD: North Morton	2,327	1,629	709
VTD: Pulaski	606	474	38
VTD: Springfield	643	496	4
Scott County Subtotal	**10,504**	**7,649**	**1,973**
Tate County	25,370	18,502	5,404
Tippah County	20,826	15,620	2,310
Tishomingo County	19,163	14,724	478
Union County	25,362	18,783	2,573
Webster County	10,294	7,607	1,410
Winston County			
VTD: Calvary	339	258	80
VTD: Ford School	427	332	46
VTD: Hinze	69	52	1
VTD: Liberty	594	413	239
VTD: Lobutcha	292	206	96
VTD: Mars Hill	343	262	43
VTD: Vowell	263	201	99
VTD: Zion Ridge			
BLK: 9502001005	1	1	0
BLK: 9502001006	40	34	11

BLK: 9502001007	51	40	31
BLK: 9502001008	0	0	0
BLK: 9502001009	1	1	1
BLK: 9502001010	3	3	1
BLK: 9502001012	14	8	4
BLK: 9502001014	3	3	0
BLK: 9502001015	0	0	0
BLK: 9502001025	19	14	14
BLK: 9502001027	3	2	2
VTD Zion Ridge Subtotal	**135**	**106**	**64**
Winston County Subtotal	**2,462**	**1,830**	**668**
District 1 Subtotal	**711,165**	**525,680**	**94,243**
District 2			
Attala County			
VTD: Aponaug	514	390	81
VTD: Carmack	399	317	0
VTD: East	1,561	1,212	121
VTD: Hesterville	516	363	47
VTD: McAdams	556	407	223
VTD: Newport	656	489	230
VTD: North Central	492	374	32
VTD: Northeast	2,711	1,887	1,323
VTD: Northwest	2,029	1,535	543
VTD: Possumneck	378	273	95
VTD: Sallis	1,519	1,026	658
VTD: South Central	2,007	1,511	494
VTD: Southwest	885	674	422
VTD: Williamsville	1,966	1,478	460

Attala County Subtotal	**16,189**	**11,936**	**4,729**
Bolivar County	40,633	28,587	17,177
Carroll County	10,769	8,134	2,801
Claiborne County	11,831	8,724	7,172
Coahoma County	30,622	20,514	13,244
Grenada County	23,263	16,945	6,408
Hinds County			
VTD: 1	297	251	146
VTD: 10	731	546	529
VTD: 11	984	745	698
VTD: 12	1,062	764	761
VTD: 13	1,309	955	944
VTD: 14	1,672	1,476	201
VTD: 15	488	410	68
VTD: 16	2,132	1,530	1,122
VTD: 17	853	694	42
VTD: 18	1,227	899	863
VTD: 19	1,148	854	846
VTD: 2	940	710	697
VTD: 20	1,880	1,237	1,222
VTD: 21	1,022	637	576
VTD: 22	2,605	1,817	1,775
VTD: 23	2,484	1,680	1,678
VTD: 24	2,382	1,345	1,201
VTD: 25	2,463	1,511	1,401
VTD: 26	1,328	844	709
VTD: 27	1,931	1,512	1,492
VTD: 28	2,053	1,630	1,615
VTD: 29	1,037	804	800
VTD: 30	1,426	995	987
VTD: 31	1,939	1,452	1,448
VTD: 32	1,362	1,038	62
VTD: 33	1,252	934	16

VTD: 34	2,184	1,700	10
VTD: 35	2,401	1,773	164
VTD: 36	1,739	1,383	437
VTD: 37	1,636	1,306	421
VTD: 38	1,442	1,007	568
VTD: 39	1,695	1,154	1,072
VTD: 4	1,121	743	736
VTD: 40	2,391	1,752	1,686
VTD: 41	2,818	2,004	1,973
VTD: 42	3,156	2,319	1,800
VTD: 43	4,359	2,968	2,360
VTD: 44	3,002	2,290	465
VI'D: 45	2,789	2,281	78
VTD: 46	2,367	1,875	268
VTD: 47	3,107	2,444	2,024
VTD: 5	1,995	1,702	731
VTD: 50	968	706	650
VTD: 51	1,013	677	664
VTD: 52	2,319	1,598	1,546
VTD: 53	585	391	380
VTD: 54	1,149	887	745
VTD: 55	1,848	1,226	1,132
VTD: 56	1,027	610	592
VTD: 57	1,436	940	914
VTD: 58	2,025	1,477	1,431
VTD: 59	3,079	1,797	1,742
VTD: 6	2,314	1,751	946
VTD: 60	987	597	549
VTD: 61	2,406	1,524	1,439
VTD: 62	2,545	1,631	1,439
VTD: 63	1,062	772	767
VTD: 64	1,101	821	805
VTD: 66	231	160	158
VTD: 67	2,186	1,408	1,194

VTD: 68	4,122	2,842	1,780
VTD: 69	2,083	1,340	846
VTD: 70	1,230	774	393
VTD: 71	2,069	1,391	706
VTD: 72	2,477	1,506	869
VTD: 73	1,887	1,367	573
VTD: 74	1,597	1,099	413
VTD: 75	1,430	943	425
VTD: 78	4,337	3,674	435
VTD: 79	2,990	2,289	876
VTD: 8	1,412	1,211	148
VTD: 80	3,625	2,332	2,147
VTD: 81	2,131	1,614	1,493
VTD: 82	2,252	1,564	1,501
VTD: 83	4,481	3,123	2,860
VTD: 84	420	326	295
VTD: 85	3,943	2,759	2,738
VTD: 86	2,615	1,506	1,421
VTD: 87	2,085	1,371	952
VTD: 88	2,937	2,101	1,630
VTD: 89	2,114	1,433	907
VTD: 9	1,836	1,585	75
VTD: 90	1,666	1,213	498
VTD: 92	3,598	2,481	1,109
VTD: 94	3,657	2,442	1,835
VTD: 95	910	657	180
VTD: Bolton	1,894	1,406	943
VTD: Brownsville	754	556	315
VTD: Cayuga	495	379	221
VTD: Chapel Hill	1,378	980	454
VTD: Cynthia	753	536	409
VTD: Edwards	3,711	2,548	1,901
VTD: Jackson State	1,658	1,596	1,588
VTD: Learned	924	661	309

VTD: Pinehaven	2,749	1,932	828
VTD: Pocahontas	620	483	310
VTD: Raymond 1	3,346	2,237	913
VTD: Tinnin	1,153	789	252
VTD: Utica 1	1,297	953	388
VTD: Utica 2	1,396	965	737
Hinds County Subtotal	**190,522**	**135,908**	**90,458**
Holmes County	21,609	14,670	10,951
Humphreys County	11,206	7,541	5,069
Issaquena County	2,274	1,645	968
Jefferson County	9,740	6,937	5,864
Leflore County	37,947	26,667	16,922
Madison County			
VTD: Bible Church	964	509	495
VTD: Camden	1,703	1,112	919
VTD: Cameron	120	96	47
VTD: Canton Pct. 7	707	519	464
VTD: Canton Precinct 1	2,644	1,824	1,195
VTD: Canton Precinct 2	2,511	1,886	799
VTD: Canton Precinct 3	603	413	265
VTD: Canton Precinct 4	3,332	2,263	1,830
VTD: Canton Precinct 5	1,732	1,082	1,072
VTD: Couparle	60	48	40
VFD: Flora	1,756	1,301	349
VTD: Gluckstadt			
BLK: 0304002116	17	11	11
BLK: 0304002119	1	1	1
BLK: 0304002157	0	0	0
BLK: 0304002158	2	2	1
VTD Gluckstadt Subtotal	**20**	**14**	**13**

VTD: Liberty	2,118	1,426	1,262
VTD: Lorman-Cavalier	1,531	1,448	410
VTD: Luther Branson School	1,207	800	658
VTD: Mad. Co. Bap. Fam. Lf .Ct.	2,013	1,188	1,186
VTD: Magnolia Heights	1,916	1,308	1,007
VTD: New Industrial Park	577	378	315
VTD: Ratliff Ferry	1,075	795	411
VTD: Sharon	855	553	455
VTD: Smith School	499	380	39
VTD: Tougaloo	605	584	581
VTD: Virlilia	532	369	173
Madison County Subtotal	29,080	19,996	13,985
Montgomery County	12,189	8,925	3,634
Panola County	34,274	24,193	10,547
Quitman County	10,117	6,880	4,396
Sharkey County	6,580	4,409	2,848
Sunflower County	34,369	24,775	16,416
Tallahatchie County	14,903	10,427	5,688
Tunica County	9,227	6,324	4,081
Warren County	49,644	35,476	14,219
Washington County	62,977	43,144	25,872
Yalobusha County	13,051	9,711	3,353
Yazoo County	28,149	20,136	9,894
District 2 Subtotal	**711,165**	**502,604**	**296,696**
District 3			
Adams County	34,340	25,149	12,370
Amite County	13,599	10,068	3,984

Chickasaw County	19,440	13,874	5,214
Clay County	21,979	15,643	8,157
Copiah County	28,757	21,014	9,976
Franklin County	8,448	6,142	1,990
Hinds County			
VTD: 76	2,526	1,891	479
VTD: 77	2,601	1,798	597
VTD: 91	3,212	2,090	1,651
VTD: 93	1,845	1,293	776
VTD: 96	2,828	2,143	716
VTD: 97	659	486	109
VTD: Byram 1	4,541	3,264	472
VTD: Byram 2	2,063	1,567	173
VTD: Clinton 1	4,406	3,713	549
VTD: Clinton 2	5,308	3,722	562
VTD: Clinton 3	4,439	3,352	744
VTD: Clinton 4	2,201	1,602	192
VTD: Clinton 5	1,590	1,231	60
VTD: Clinton 6	3,697	2,710	720
VTD: Dry Grove	1,076	798	222
VTD: Old Byram	2,665	1,975	173
VTD: Raymond 2	4,257	3,590	1,321
VTD: Spring Ridge	4,297	3,046	1,077
VTD: St Thomas	560	390	374
VTD: Terry	5,507	4,166	1,476
Hinds County Subtotal	**60,278**	**44,827**	**12,443**
Jasper County	18,149	13,077	6,400
Jefferson Davis County	13,962	9,998	5,292
Jones County			
VTD: Gitano	447	335	84
VTD: Hebron	1,201	838	543
VTD: Matthews	867	627	61

VTD: Soso	1,600	1,175	504
Jones County Subtotal	**4,115**	**2,975**	**1,192**
Kemper County	10,453	7,795	4,253
Lauderdale County	78,161	57,370	19,778
Lawrence County	13,258	9,635	2,872
Lincoln County	33,166	24,324	6,748
Lowndes County	61,586	43,963	16,599
Marion County			
VTD: Balls Mill	1,071	806	171
VTD: City Hall Beat 3	828	598	205
VTD: Courthouse Beat 4	1,324	1,018	126
VTD: Darbun	447	347	47
VTD: East Columbia			
BLK: 9504003077	29	22	19
BLK: 9504003078	0	0	0
BLK: 9504003079	0	0	0
BLK: 9504003080	0	0	0
BLK: 9504003081	58	40	37
BLK: 9504003082	0	0	0
BLK: 9504003083	3	3	3
BLK: 9504004059	0	0	0
BLK: 9504004060	0	0	0
BLK: 9504004061	0	0	0
BLK: 9504004994	0	0	0
BLK: 9505001006	6	6	0
BLK: 9505001007	13	11	3
BLK: 9505001008	19	15	0
BLK: 9505001009	6	4	4
BLK: 9505001010	0	0	0
BLK: 9505001011	5	4	0
BLK: 9505001012	0	0	0
BLK: 9505001013	5	3	0

BLK: 9505001014	36	18	12
BLK: 9505001015	12	8	8
BLK: 9505001016	9	6	0
BLK: 9505001017	43	23	23
BLK: 9505001018	13	9	0
BLK: 9505001019	20	18	0
BLK: 9505001020	9	7	0
BLK: 9505001021	5	5	0
BLK: 9505001048	0	0	0
BLK: 9505001049	13	10	0
BLK: 9505001997	0	0	0
BLK: 9505001998	0	0	0
BLK: 9505001999	0	0	0
BLK: 9505002000	19	13	1
BLK: 9505002001	4	3	0
BLK: 9505002002	0	0	0
BLK: 9505002003	0	0	0
BLK: 9505002004	22	18	12
BLK: 9505002005	5	5	0
BLK: 9505002006	10	9	7
BLK: 9505002007	2	2	0
BLK: 9505002008	0	0	0
BLK: 9505002009	13	10	0
BLK: 9505002010	50	35	0
BLK: 9505002011	74	54	35
BLK: 9505002030	47	39	6
BLK: 9505002033	0	0	0
BLK: 9505002034	0	0	0
BLK: 9505002035	11	9	0
BLK: 9505002036	3	3	0
BLK: 9505002037	23	18	0
BLK: 9505002038	5	5	0
BLK: 9505002039	2	2	2
BLK: 9505002040	0	0	0

BLK: 9505002041	4	2	2
BLK: 9505002042	23	21	9
BLK: 9505002043	56	43	25
BLK: 9505002044	0	0	0
BLK: 9505002045	0	0	0
BLK: 9505002046	0	0	0
BLK: 9505002047	26	22	22
BLK: 9505002048	0	0	0
BLK: 9505002049	4	3	3
BLK: 9505002050	15	14	14
BLK: 9505002051	2	2	0
BLK: 9505002052	0	0	0
BLK: 9505002053	2	2	2
BLK: 9505002054	132	92	85
BLK: 9505002055	209	134	134
BLK: 9505002056	5	1	1
BLK: 9505002057	0	0	0
BLK: 9505002058	33	24	24
BLK: 9505002059	95	60	52
BLK: 9505002060	14	8	8
BLK: 9505002061	20	12	12
BLK: 9505002062	16	12	12
BLK: 9505002063	15	10	10
BLK: 9505002064	46	29	29
BLK: 9505002065	34	19	19
BLK: 9505002066	52	27	25
BLK: 9505002067	0	0	0
BLK: 9505002068	144	60	54
BLK: 9505002069	28	16	14
BLK: 9505002070	42	19	19
BLK: 9505002071	11	9	9
BLK: 9505002072	58	41	28
BLK: 9505002073	0	0	0
BLK: 9505002074	0	0	0

BLK: 9505002075	109	63	61
BLK: 9505002076	0	0	0
BLK: 9505002077	0	0	0
BLK: 9505002078	62	40	39
BLK: 9505002079	0	0	0
BLK: 9505002080	13	8	4
BLK: 9505002081.	11	8	8
BLK: 9505002082	5	3	3
BLK: 9505002083	60	37	37
BLK: 9505002084	5	2	0
BLK: 9505002085	0	0	0
BLK: 9505002086	0	0	0
BLK: 9505002087	0	0	0
BLK: 9505002088	10	7	5
BLK: 9505002089	0	0	0
BLK: 9505002090	0	0	0
BLK: 9505002091	37	23	23
BLK: 9505002092	10	7	6
BLK: 9505002093	10	7	7
BLK: 9505002094	0	0	0
BLK: 9505002095	0	0	0
BLK: 9505002096	0	0	0
BLK: 9505002097	0	0	0
BLK: 9505002098	3	3	0
BLK: 9505002099	0	0	0
BLK: 9505002112	0	0	0
BLK: 9505002992	0	0	0
BLK: 9505002994	0	0	0
BLK: 9505002995	0	0	0
BLK: 9505002997	0	0	0
BLK: 9505002998	0	0	0
BLK: 9505002999	0	0	0

VTD East Columbia Subtotal	**2,015**	**1,327**	**986**
VTD: Foxworth	1,691	1,187	348
VTD: Goss	837	614	105
VTD: Hub	919	662	325
VTD: Jefferson Middle School	688	437	421
VTD: Kokomo	971	706	191
VTD: Morgantown	777	581	8
VTD: Pinebur	956	691	168
VTD: Pittman	933	681	11
VTD: Sandy Hook	535	408	108
VTD: South Columbia	860	713	571
VTD: Stovall	907	607	253
VTD: Union	440	329	14
VTD: White Bluff	139	96	2
Marion County Subtotal	**16,338**	**11,808**	**4,060**
Monroe County	38,014	27,673	7,795
Newton County	21,838	16,126	4,515
Noxubee County	12,548	8,697	5,774
Oktibbeha County			
VTD: Bell Schoolhouse	536	377	277
VTD: Center Grove	639	449	225
VTD: Central Starkville	3,375	2,529	1,313
VTD: East Starkville	3,586	3,316	736
VTD: Gillespie Street Center	3,132	2,340	657
VTD: Hickory Grove	2,644	2,140	872
VTD: North Starkville	3,491	2,727	890
VTD: Northeast Starkville	2,967	2,795	865
VTD: Oktoc	1,301	915	669

VTD: Osborn	1,805	1,243	881
VTD: Sessums	1,562	1,063	732
Oktibbeha County Subtotal	**25,038**	**19,894**	**8,117**
Pike County	38,940	28,154	12,385
Rankin County			
VTD: Clear Branch	1,574	1,159	175
VTD: Cleary	1,564	1,226	42
VTD: East Steens Creek	2,584	1,889	339
VTD: Monterey	3,285	2,344	518
VTD: Mountain Creek	546	389	69
VTD: South Pearson	1,466	1,043	382
VTD: South Richland	4,187	2,976	216
VTD: Springhill	3,286	2,274	810
VTD: West Brandon	6,432	4,537	1,057
VTD: West Steens Creek	4,364	3,061	332
VTD: Whitfield	4,563	4,319	2,683
Rankin County Subtotal	**33,851**	**25,217**	**6,623**
Scott County			
VTD: Harperville	1,851	1,313	662
VTD: High Hill	629	448	225
VTD: Hillsboro	1,394	914	520
VTD: Homewood	550	416	90
VTD: Lake	640	448	210
VTD: Langs Mill	1,433	1,053	326
VTD: North Forest	2,586	1,724	1,127
VTD: Northeast Forest	946	723	71
VTD: Northwest Forest	694	526	60
VTD: Salem	1,184	795	401
VTD: Sebastapol	913	664	50
VTD: South Forest	3,112	2,240	991
VTD: Steele	1,273	889	516

VTD: Usry	714	491	59
Scott County Subtotal	**17,919**	**12,644**	**5,308**
Simpson County	27,639	19,920	6,138
Smith County	16,182	11,731	2,367
Walthall County	15,156	10,853	4,266
Wilkinson County	10,312	7,648	5,014
Winston County			
VTD: American Legion	1,989	1,338	1,063
VTD: Bethany	242	186	21
VTD: Betheden-Loakfoma	363	278	89
VTD: Bond	915	673	166
VTD: County Agent	1,794	1,190	945
VTD: Crystal Ridge	385	287	65
VTD: Dean Park	404	269	239
VTD: E.M.E.P.A.	1,357	1,007	269
VTD: Elementary School	834	610	288
VTD: Ellison Ridge	436	343	76
VTD: Fairground	2,044	1,583	586
VTD: Gum Branch	134	103	12
VTD: Louisville Electric	224	158	40
VTD: Louisville High School	429	305	68
VTD: Lovorn Tractor	297	244	16
VTD: Nanih Waiya	1,378	1,005	170
VTD: Nanih Waiya-Handle	573	410	88
VTD: New Hope	271	222	13
VTD: Noxapater	1,618	1,200	344
VTD: Old National Guard Armory	904	750	61
VTD: Sinai	369	276	147
VTD: Zion Ridge			
BLK: 9502001011	0	0	0
BLK: 9502001013	9	9	4
BLK: 9502001016	7	6	0

BLK: 9502001017	212	150	146
BLK: 9502001018	0	0	0
BLK: 9502001019	34	20	16
BLK: 9502001020	0	0	0
BLK: 9502001021	0	0	0
BLK: 9502001022	0	0	0
BLK: 9502001023	0	0	0
BLK: 9502001024	46	28	10
BLK: 9502001026	71	47	46
BLK: 9502001028	16	11	11
BLK: 9502001034	0	0	0
BLK: 9502001035	4	2	2
BLK: 9502001036	112	70	70
BLK: 9502001037	1	1	0
BLK: 9502001038	11	5	5
BLK: 9502001044	4	3	3
BLK: 9502001045	40	29	29
BLK: 9502001046	37	24	22
BLK: 9502001047	50	29	28
BLK: 9502001048	0	0	0
BLK: 9502001049	45	32	11
BLK: 9502001050	28	21	21
BLK: 9502001051	0	0	0
BLK: 9502001064	11	9	9
BLK: 9502001065	0	0	0
BLK: 9502001998	0	0	0
BLK: 9502001999	0	0	0
VTD Zion Ridge Subtotal	**738**	**496**	**433**
Winston County Subtotal	**17,698**	**12,933**	**5,199**
District 3 Subtotal	**711,164**	**519,152**	**194,829**

District 4

Clarke County	17,955	13,147	4,193
Covington County	19,407	13,813	4,372
Forrest County	72,604	54,801	16,479
George County	19,144	13,560	1,080
Greene County	13,299	10,088	2,778
Hancock County	42,967	32,163	2,026
Harrison County	189,601	140,213	27,051
Jackson County	131,420	95,072	181,112
Jones County			
VTD: Anthonys Florist	927	582	415
VTD: Antioch	753	595	0
VTD: Blackwell	135	93	3
VTD: Bruce	559	449	14
VTD: Calhoun	3,275	2,525	47
VTD: Cameron Center	709	515	131
VTD: Centerville	475	354	2
VTD: Cooks Ave. Comm Ctr.	824	582	568
VTD: County Barn	1,861	1,498	317
VTD: Currie	270	185	169
VTD: Ellisville Court House	1,507	1,216	256
VTD: Erata	642	485	233
VTD: Glade School	1,894	1,451	23
VTD: Johnson	1,001	706	4
VTD: Lamar School	1,768	1,292	358
VTD: Landrum Comm. Ctr.	740	570	2
VTD: Laurel Courthouse	1,771	1,291	358
VTD: Maple Street YWCA	472	329	304
VTD: Mason School	2,078	1,668	39
VTD: Moselle	1,757	1,311	186
VTD: Myrick	1,716	1,275	8

VTD: National Guard Armory	2,353	1,606	1,159
VTD: Nora Davis School	1,790	1,293	1,146
VTD: Oak Park School	1,859	1,153	1,125
VTD: Old Health Dept.	499	307	271
VTD: Ovett	1,301	954	12
VTD: Pendorf	646	493	14
VTD: Pinegrove	1,510	1,168	84
VTD: Pleasant Ridge	892	694	5
VTD: Powers Comm. Ctr.	1,633	1,187	237
VTD: Rainey	1,581	1,185	1
VTD: Roosevelt	601	427	323
VTD: Rustin	1,148	855	1
VTD: Sandersville Civic Center	1,386	1,042	92
VTD: Sandhill	924	716	1
VTD: Shady Grove	4,332	3,150	573
VTD: Sharon	3,508	2,604	376
VTD: Shelton	1,116	843	180
VTD: South Jones	1,357	1,047	191
VTD: Stainton	1,882	1,445	646
VTD: Tuckers	1,642	1,223	33
VTD: Twenty-Sixth St. Fire Stn	803	655	76
VTD: Union	1,279	942	28
VTD: West Jones	1,667	1,262	240
Jones County Subtotal	**60,843**	**45,223**	**10,069**
Lamar County	39,070	28,134	3,262
Marion County			
VTD: Broom	831	590	202
VTD: Carley	1,389	1,016	129
VTD: Cedar Grove	820	573	167

VTD: East Columbia			
BLK: 9505002029	47	34	1
BLK: 9505002031	6	5	5
BLK: 9505002032	39	24	3
VTD East Columbia Subtotal	**92**	**63**	**9**
VTD: Morris	1,545	1,129	308
VTD: National Guard Beat 1	2,666	1,866	117
VTD: Popetown Beat 2	1,914	1,434	304
Marion County Subtotal	**9,257**	**6,671**	**1,236**
Pearl River County	48,621	35,515	3,961
Perry County	12,138	8,655	1,697
Stone County	13,622	9,966	1,779
Wayne County	21,216	15,014	5,131
District 4 Subtotal	**711,164**	**522,035**	**103,226**
State Totals	**2,844,658**	**2,069,471**	**688,994**

APPENDIX K

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY,
MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER;
L. C. DORSEY; DAVID RULE; MELVIN
MORTON; JAMES WOODARD; JOSEPH
P. HUDSON; AND ROBERT NORVEL — PLAINTIFFS

vs. — No. G-2001-1777 W/4

ERIC CLARK, Secretary of State
of Mississippi; MIKE MOORE, Attorney General
of Mississippi; RONNIE MUSGROVE,
Governor of Mississippi — DEFENDANTS

(Filed Dec. 13, 2001)

ORDER

The Mississippi Republican Executive Committee has filed a Motion to Dismiss, for More Definite Statement, and for Relief from Prior Orders. In a cover letter to the Court, its attorney references the December 6 order granting the state defendants' motion to add parties and the subsequent December 7 order reconsidering that December 6 order. The Committee's attorney states that he presumes the December 7 order vacates the December 6 order, but that he is filing these motions out of an abundance of caution.

The state defendants filed a motion on December 6 to join the Mississippi Republican Executive Committee and the Mississippi Democratic Executive Committee as parties. This

came one day after the federal court's December 5 order. On December 6, this Court issued a new scheduling order containing an expedited schedule and a December 14 trial date in light of the federal court order. This Court also granted on December 6 the state defendants' motion to join the executive committees. Upon reconsideration *sua sponte*, the Court vacated that order on December 7, stating that the involuntary joinder of additional parties "would not serve the interests of the state authorities to proceed expeditiously." The plaintiffs have argued that the Republican and Democratic executive committees are not necessary and indispensable parties for any purpose, including the purpose of granting relief, citing *Connor v. Finch*, 469 F. Supp. 693, 694 (S.D. Miss. 1979).

For the reasons stated in the plaintiffs' argument, and for the reasons set forth in this Court's order of reconsideration dated December 7, the Court believes that the party executive committees are not indispensable parties. By virtue of the federal court's December 5 order, the case in this Court must proceed expeditiously. Adding involuntary parties at the state defendant's request at this stage of the case could impair the effort to proceed expeditiously, particularly if those parties object to going forward under the existing schedule.

The order of December 6 is vacated, and the political parties are not involuntarily joined in this case. Neither party executive committee has moved to intervene, and the Republican Executive Committee has specifically stated that it chooses not to intervene on a voluntary basis. As suggested in prior orders of the Court, and as stated again at the hearing held on December 11, they are free to intervene and voluntarily participate at any time if they so choose. Of course, they will be required to participate in accordance with the existing scheduling order. Of course, they will be required to

participate in accordance with the existing scheduling order. All they need to do is file an appearance and a notice with the Court.

Accordingly, the order of December 6 stands vacated. The motions of the Mississippi Republican Executive Committee are dismissed as moot.

This 13th day of December, 2001.

/s/ Patricia D. Wise
CHANCELLOR

Submitted by:

/s/ Carlton W. Reeves
Plaintiff's Co-Counsel

APPENDIX L

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY,
MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER; L. C. DORSEY; DAVID RULE; MELVIN MORTON; JAME WOODARD; JOSEPH P. HUDSON; AND ROBERT NORVEL — PLAINTIFFS

vs. — No. G-2001-1777 W/4

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi — DEFENDANTS

(Filed Dec. 13, 2001)

ORDER

The intervenors have moved to amend the scheduling order which sets trial for December 14. The Court's prior scheduling order, entered December 3, set trial for January 14. However, because of the concerns stated in the December 5, 2001 order of the federal court, this Court altered the scheduling order and set trial for December 14.

The intervenors filed their motion to intervene on November 13. At a hearing that same day, the plaintiffs and state defendants both stated that they did not object to the motion. The motion was granted orally and later was memorialized in writing on November 19. On November 13, the plaintiffs also presented this Court with a proposed

scheduling order asking that trial be set for December 4. Although the Court did not adopt that proposal, all parties have been on notice that the proceedings would be expedited. The parties have been free to seek discovery and to move to shorten the time for discovery responses, although no such motion has been filed.

The December 3 order gave the parties over 40 days notice of the January 14 trial. It was only because of the December 5 federal court order that this Court felt it necessary on December 6 to move the trial up to December 14.

For these reasons, and for those set forth in the argument and response of the plaintiffs, the motion to amend the scheduling order is denied.

This 13th day of December, 2001.

/s/ Patricia D. Wise
CHANCELLOR

Submitted by:

/s/ Carlton W. Reeves
Plaintiff's Co-Counsel

APPENDIX M

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY,
MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER; L. C. DORSEY; DAVID RULE; MELVIN MORTON; JAMES WOODARD; JOSEPH P. HUDSON; AND ROBERT NORVEL — PLAINTIFFS

vs. — No. G-2001-1777 W/4

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi — DEFENDANTS

(Filed Dec. 13, 2001)

ORDER

The intervenors have moved to dismiss this case and have supplemented that motion. The plaintiffs have filed multiple briefs in response to the motion and the supplement. After considering the motion, the briefs, and the oral argument held December 11, 2001, the motion to dismiss is hereby denied for the reasons set forth in the plaintiffs' responses, as well as for the reasons set forth in this Court's December 3 order denying the state defendants' motion to dismiss.

This 13th day of December, 2001.

/s/ Patricia D. Wise
CHANCELLOR

Submitted by:

/s/ Carlton W. Reeves
Plaintiff's Co-Counsel

APPENDIX N

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; MELVIN HORTON; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL — PLAINTIFFS

V. — Cause No. G-2001-1777 W/4

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi — DEFENDANTS

(Filed Dec. 7, 2001)

AMENDED SCHEDULING ORDER

On December 3, 2001, this Court issued a scheduling order setting trial in this matter for January 14, 2002. On December 5, a three-judge panel of the United States District Court for the Southern District of Mississippi issued an order stating that "if it is not clear to this Court by January 7, 2002 that the State authorities can have a redistricting plan in place by March 1, we will assert our jurisdiction and proceed expeditiously to rule on the Plaintiffs' Motion for Preliminary Congressional Districts." *Smith v. Clark*, No. 3:01-CV-855WS (S.D. Miss. Order of Dec. 5, 2000). Although this Court believes that the December 3 scheduling order set out a reasonable time frame, it is useful to avoid a situation where the federal and state

courts are involved in the process of adopting redistricting plans at the same time. Therefore, the Court finds and orders that the parties comply with the following scheduling order which supersedes the orders of December 3 and 6, 2001:

1. All motions to add parties and motions to intervene and/or appear *amicus curiae* shall be filed by December 10, 2001.

2. A hearing will be held on December 11, 2001 at 2:30 p.m. before the Honorable Patricia D. Wise to consider any such motions, as well as any other matters raised by the parties. All parties are required to attend unless specifically excused by the Court.

3. All experts will be designated no later than 12:00 p.m. on December 13, 2001.

4. Given the nature of this litigation and after having considered Rule 26 of the Mississippi Rules of Civil Procedure, all parties are encouraged to fully and expeditiously cooperate in discovery. All discovery shall be completed by December 13, 2001 at 1:00 p.m.

5. All proposed redistricting plans should be filed and exchanged by the parties and any *amicus curiae* no later that 12:00 p.m., December 13, 2001. In addition, the parties shall file and exchange a proposed list of witnesses and exhibits no later than 12:00 p.m. on December 13, 2001.

6. A pretrial status conference will be held on December 13, 2001 at 2:30 p.m. before the Honorable Patricia D. Wise. All parties are required to attend.

7. Trial of this matter shall take place on December 14, 2001 beginning at 9:30 a.m., Saturday, December 15, 2001, December 17, 18, 19, 2001.

8. The parties shall submit position papers and briefs for consideration no later than 11:00 a.m. on December 20, 2001.

9. The Court will attempt to adopt a plan no later than December 21, 2001 so that the State's chief legal officer can submit it for preclearance no later than December 28, 2001, and sooner if possible. All parties shall cooperate in assisting the State's chief legal officer so that the preclearance obligation can be fulfilled in a prompt and timely manner.

10. Copies of all pleadings, the proposed plans, and the lists of witnesses and exhibits shall be served on all parties by hand if possible, and if not by hand, by facsimile as well as by mail.

SO ORDERED AND ADJUDGED, this 7th day of December, 2001.

/s/ Patricia D. Wise
CHANCELLOR

APPENDIX O

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; MELVIN HORTON; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL — PLAINTIFFS

V.

Cause No. G-2001-1777 W/4

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi — DEFENDANTS

(Filed Dec. 7, 2001)

ORDER OF RECONSIDERATION AND OPINION REGARDING THE MOTION TO JOIN INDISPENSABLE PARTIES

COMES NOW, the Court *sua sponte* to reconsider its Order of December 6, 2001, granting the State Defendants' Motion to Add Indispensable Parties pursuant to Rules 19 and 20 of the Mississippi Rules of Civil Procedure. After the Court's reconsideration, the Court is of the opinion that any additional parties involuntarily joined herein who choose not to submit themselves to the Court's jurisdiction which includes voluntary participation in the Court's Scheduling Order dated December 7, 2001 would not serve the interest of the state authorities to proceed expeditiously.

Pursuant to Rule 19 of the Mississippi Rules of Civil Procedure, this Court must first determine whether joinder of the State Republican Executive Committee and the State Democratic Executive Committee are feasible. There are four factors that the Court must consider. Initially, the Court must determine the Plaintiff's interest in having a forum. This Court reiterates that the Defendants argue that it is primarily the responsibility of the legislature to draw redistricting plans. However, where the legislative fails to act, the courts will act, thus giving the Plaintiffs a forum. The Plaintiffs' interest in having their grievances heard is recognized and respected by this Court.

The second issue this Court must consider is the Defendants' wish to avoid multiple litigation, inconsistent relief, or sole responsibility for a liability shared with others. The federal court has allowed the state authorities to make clear that it will timely carry out their duty. When the Court meets that deadline enumerated by the federal court Order dated December 5, 2001, the Defendants fear of multiple litigation or inconsistent relief is absolved. Furthermore, the sole responsibility for enforcing election laws in the State of Mississippi belong to the present State Defendants, the Governor, Secretary of State, and Attorney General of the State of Mississippi.

Third, the Court must consider the interest of an outsider whom it would have been desirable to join. The State Defendants moved this Court to join the State Democratic Executive Committee and the State Republican Executive Committee. The Court notes as a general proposition that the purpose of redistricting is not to satisfy the fancy of any political party or candidate. The purpose of redistricting is to ensure that the electorate enjoys orderly, timely, and efficient

elections without the flux of delays, date changes, and continuances as outlined in the federal court's opinion dated December 5, 2001.

Last, the Court must consider the interests of the courts and the electorate in complete, consistent, and efficient settlement of controversies. The Court recognizes a strong interest in ensuring that all election laws of the State of Mississippi are followed in a timely fashion. The Court also notes the interest of the electorate in avoiding voter and candidate confusion that accompanies an untimely filed redistricting plan.

Therefore, after reviewing the factors enumerated pursuant to Mississippi Rule of Civil Procedure 19(a), this Court hereby finds that the State Democratic Executive Committee and the State Republican Executive Committee cannot be feasibly joined as indispensable parties to this action.

This Court must also determine whether in equity and good conscience this action should proceed among the parties before it. There are four factors that the Court must consider: (1) to what extent a judgment rendered in the parties' absence might be prejudicial to the party or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudicial effect can be lessened or avoided; (3) whether a judgment rendered in the parties' absence will be adequate; and (4) whether the Plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Considering the rationale from the above analysis, this Court hereby finds and adjudges that this action should in equity and good conscience proceed among the parties before it.

SO ORDERED AND ADJUDGED, this the 7th day of December, 2001.

/s/ Patricia D. Wise
CHANCELLOR

APPENDIX P

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY,
MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER;
L.C. DORSEY; DAVID RULE; MELVIN HORTON;
JAMES WOODARD; JOSEPH P. HUDSON; and
ROBERT NORVEL PLAINTIFFS

V. No. G-2001-1777 W/4

ERIC CLARK, Secretary of State of
Mississippi; MIKE MOORE, Attorney General
of Mississippi; RONNIE MUSGROVE, Governor
of Mississippi DEFENDANTS

(Filed Dec. 7, 2001)

SCHEDULING ORDER

On December 3, 2001, this Court issued a scheduling order setting trial in this matter for January 14, 2002. On December 5, a three-judge panel of the United States District Court for the Southern District of Mississippi issued an order stating that it "if it is not clear to this Court by January 7, 2002 that the State authorities can have a redistricting plan in place by March 1, we will assert our jurisdiction and proceed expeditiously to rule on the Plaintiffs' Motion for Preliminary Injunction, and if necessary, we will draft and implement a plan for reapportioning the state congressional districts." Smith v. Clark, No. 3:01-CV-855WS (S.D. Miss., Order of Dec. 5, 2001). Although this Court believes that the December 3

scheduling order set out a reasonable time frame, it is useful to avoid a situation where the federal and state courts are involved in the process of adopting redistricting plans at the same time. In light of the order entered by the federal court and the arguments of counsel, it is appropriate to revise the scheduling order entered on December 3, 2001. Therefore, the Court finds and orders that the parties comply with the following scheduling order, which supersedes the order of December 3, 2001.

1. All motions to add parties and motions to intervene and/or appear *amicus curiae* shall be filed by December 10, 2001.

2. A hearing will be held on December 11, 2001 at 2:30 PM before the Honorable Patricia D. Wise to consider any such motions, as well as any other matters raised by the parties.

3. All experts shall be designated no later than noon on December 13, 2001.

4. All proposed redistricting plans should be filed and exchanged by the parties and any *amicus curiae* no later than noon on December 13, 2001. In addition, the parties shall file and exchange a proposed list of witnesses and exhibits no later than noon on December 13, 2001.

5. A pretrial status conference will be held on December 13, 2001 at 2:30 P.M. before the Honorable Patricia D. Wise.

6. Trial of this matter will begin on December 14, 2001 at 9:30 AM. Trial will continue on Saturday, December 15, at 9:30 AM. It will resume on December 17, 2001 at 9:30 AM, and will last, if necessary, through December 19.

7. The parties will submit position papers and briefs for the Court's consideration no later than 11:00 A.M. on December 20, 2001.

8. The Court will attempt to adopt a plan by December 21, 2001, and if not then, no later than December 24, 2001, so that the State's chief legal officer can submit it for preclearance as promptly as possible. All parties shall cooperate in assisting the State's chief legal officer so that the preclearance obligation can be fulfilled in a prompt manner.

9. Copies of all pleadings, the proposed plans, and the lists of witnesses and exhibits shall be served on all parties by hand if possible, and if not by hand, by fax as well as by mail.

SO ORDERED ADJUDGED,

This the 6th day of December, 2001.

/s/ Patricia D. Wise
CHANCELLOR

APPENDIX Q

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT
HINDS COUNTY, MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; MELVIN HORTON; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL — PLAINTIFFS

V. — Cause No. G-2001-1777 W/4

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi — DEFENDANTS

(Filed Dec. 6, 2001)

ORDER

The Court having considered the State Defendants' Motion to Add Indispensable Parties Under Rules 19 and 20, and the Court being of the opinion that the motion is well taken and should be granted. It is hereby

ORDERED that the Mississippi Democratic Executive Committee and the Mississippi Republican Executive Committee be, and hereby are, joined as parties in this action. Said parties shall forthwith and immediately be served with copies of this order.

SO ORDERED this the 6th day of December, 2001.

/s/ Patricia D. Wise
CHANCELLOR

APPENDIX R

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY,
MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER;
L.C. DORSEY; DAVID RULE; MELVIN HORTON;
JAMES WOODARD; JOSEPH P. HUDSON; and
ROBERT NORVEL PLAINTIFFS

V. No. G-2001-1777 W/4

ERIC CLARK, Secretary of State of
Mississippi; MIKE MOORE, Attorney General
of Mississippi; RONNIE MUSGROVE, Governor
of Mississippi DEFENDANTS

(Filed Dec. 3, 2001)

SCHEDULING ORDER

COMES NOW this Court and finds and orders that the parties comply with the following scheduling order:

1. A status conference shall be held on December 6, 2001, at 2:30 p.m. at the Chancery Courthouse before the Honorable Patricia D. Wise. All parties are required to attend.

2. All motions to add parties and motions to intervene and/or appear *amicus curiae* shall be filed by December 10, 2001.

3. All written discovery shall be propounded and served no

later than December 11, 2001.

4. All written discovery shall be served and any depositions shall be taken no later than December 31, 2001.

5. All experts shall be designated on or before January 7, 2001.

6. All proposed redistricting plans should be filed and exchanged by the parties and any *amicus curiae* no later than January 7, 2001. In addition, the parties shall file and exchange a proposed list of witnesses and exhibits no later than January 7, 2001. Copies of all pleadings, the proposed plans, and the lists of all witnesses and exhibits shall be served on all parties by hand or facsimile, as well as by mail on or before January 7, 2001.

7. A status conference will be held on January 9, 2002 at 10:30 a.m. at the Chancery Courthouse before the Honoroable Patricia D. Wise. All parties are required to attend.

8. Trial of this matter shall take place on January 14, 2002 beginning at 9:30 a.m. The trial shall not last more than seven (7) week days. However, the Court may conduct trial on Saturday, January 19, 2002 at its discretion.

9. All parties shall submit position papers and briefs for the Court's consideration no later than Friday, January 25, 2002.

SO ORDERED AND ADJUDGED.

THIS, the 3rd day of December, 2001.

/s/ Patricia D. Wise
CHANCELLOR

APPENDIX S

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY,
MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER;
L.C. DORSEY; DAVID RULE; MELVIN HORTON;
JAMES WOODARD; JOSEPH P. HUDSON; and
ROBERT NORVEL PLAINTIFFS

V. No. G-2001-1777 W/4

ERIC CLARK, Secretary of State of
Mississippi; MIKE MOORE, Attorney General
of Mississippi; RONNIE MUSGROVE, Governor
of Mississippi DEFENDANTS

(Filed Dec. 3, 2001)

ORDER

This matter came before the Court on Defendants' Supplemental Motion to Dismiss the Amended Complaint, to Reconsider, and Application for Relief Pursuant to M. R. App P. Rule 21 to reconsider the Court's Order of November 19, 2001. The Court, having read the briefs on file, having heard oral arguments on said motion on November 19, 2001, and being fully advised of all premises, hereby finds and orders as follows:

The Defendants have requested that this Court reconsider its Order denying the Defendants' initial Motion to Dismiss on the issue of ripeness. The Court hereby finds that the

Defendants failed to present new arguments regarding the issue of ripeness in their supplemental motion to dismiss. The Court's prior ruling on the issue of ripeness is outlined in the Court's Order dated November 19, 2001. The Court hereby incorporates said Order by reference herein. Accordingly, the Defendants' Motion for Reconsideration of their Motion to Dismiss on the issue of ripeness is hereby denied.

Alternatively, the Defendants have moved this Court to reconsider its ruling on the Defendants' motion to dismiss on the issue of improper parties. The Defendants argue that the named defendants are not proper parties to this action. The Court notes that the Honorable Mike Moore, Attorney General of the State of Mississippi, first made this argument before the Court on November 19, 2001. The named Defendants, the Governor, the Secretary of State, and the Attorney General of the State of Mississippi as named in their official capacities, are members of the State Board of Election Commissioners and are charged with the duty of enforcing election laws. The Court notes and adopts this procedure based upon cases, including, but not limited to, *Conner v. Johnson*, 256 F. Supp. 962 (S.D. Miss. 1966); *Jordan v. Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982); *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987); *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss. 1991); and *NAACP v. Fordice*, 252 F.3d 361 (5th Cir. 2001).

This Court further notes that assuming *arguendo*, that the named Defendants are not the proper parties, the Court finds that under the circumstances, a dismissal based upon an alleged failure to name the proper parties is not an appropriate remedy to a proposed procedural defect. The Court finds that any party may motion this Court to include additional parties and leave shall be freely granted. This Court orders and adjudges that the Defendants' motion to dismiss based upon an improperly

named Defendants is hereby denied.

The Court finds that the Defendants also moved this Court to reconsider its denial of Defendants' Motion to dismiss on the issue of jurisdiction. The Defendants argue that this Court does not have subject matter jurisdiction to hear matters presented in Plaintiffs' Amended Complaint. The Defendants argue that this matter is primarily one for the Mississippi State Legislature. However, when the legislature fails to act in a timely manner to adopt a re-districting plan, it is the duty of the Court to adopt a plan. The chancery court is a court of equity. *Miss. Const., Art. 6, Sec. 159.* The Court notes that the Plaintiffs have requested equitable relief in their Amended Complaint. While the Defendants argue that the chancery court has no subject matter jurisdiction with regard to electoral process, this Court finds that the Mississippi Supreme Court has not prohibited the chancery court from hearing cases involving electoral matters. (*See e.g. Adams County Election Commission v. Sanders*, 586 So. 2d 829 (Miss. 1991). In fact the Mississippi Supreme Court has affirmed a chancery court's opinion involving the electoral process, specifically stating, "[w]e think the lower court acted properly and within the applicable statutes and law in entering [that] final decree. *Carter v. Luke*, 399 So. 2d 1356, 1358 (Miss. 1981). This Court further notes that the United Supreme Court has indicated that "state courts have a significant role in redistricting . . . and the power of the state judiciary of a State to require a valid redistricting plan . . . has been specifically encouraged. *Growe v. Emison*, 507 U.S. 25, 33 (1993). Therefore, the Defendants' Motion to Dismiss on the issue of subject matter jurisdiction is hereby denied.

The Defendants have failed to cite specific relief requested pursuant to M. R. App. P. Rule 21, and the same is hereby

denied.

The Court finds and orders that the Defendants' Supplemental Motion to Dismiss the Amended Complaint, to Reconsider, and Application for Relief Pursuant to M. R. App. P. Rule 21 is not well taken and is hereby denied.

SO ORDERED AND ADJUDGED, this 3rd day of December, 2001.

/s/ Patricia D. Wise
CHANCELLOR

APPENDIX T

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY,
MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER;
L.C. DORSEY; DAVID RULE; MELVIN HORTON;
JAMES WOODARD; JOSEPH P. HUDSON; and
ROBERT NORVEL PLAINTIFFS

V. No. G-2001-1777 W/4

ERIC CLARK, Secretary of State of
Mississippi; MIKE MOORE, Attorney General
of Mississippi; RONNIE MUSGROVE, Governor
of Mississippi DEFENDANTS

(Filed Nov. 19, 2001)

ORDER

The defendants have moved to dismiss the Complaint as premature and unripe. Oral argument on the motion was held on November 13, 2001. The Court is of the opinion that the defendants' motion should be denied. The Court agrees with and adopts the arguments of plaintiff as set forth below.

Although a special session of the Mississippi Legislature recently was convened for the purpose of adopting a congressional plan that the state, no plan was enacted and the legislature adjourned. The plaintiffs have filed this action asking this Court to grant injunctive relief by adopting and ordering the implementation of a lawful redistricting plan if the

legislature fails to do so in a timely manner.

The legislature still has time to enact a plan and hopefully will do so. But in the event no plan is enacted in a timely fashion, it will be appropriate for this Court to enforce the law by adopting and implementing a plan. As the plaintiffs pointed out during oral argument, they have invoked the jurisdiction of this Court sitting as a court of equity in Hinds County, which is the seat of government of the State of Mississippi. The United States Supreme Court has said that "state courts have a significant role in redistricting," *Growe v. Emison*, 507 U.S. 25, 33 (1993), and also has said: "The power of the judiciary of a State to require valid reapportionment or to require a valid redistricting plan has not only been recognized by this Court, but . . . has been specifically encouraged." *Id., quoting, Scott v. Germano*, 381 U.S. 407, 409 (1965).

A separate lawsuit seeking implementation of a new congressional redistricting plan has been filed in federal court. *Smith v. Clark*, No. 3:01cv855WS (S.D. Miss.). But the existence of that lawsuit does not relieve the state courts of Mississippi of their obligation to act in the event of a legislative default once their jurisdiction is invoked by a lawsuit such as this one. As the United States Supreme Court has explained:

> In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself.

Growe v. Emison, 507 U.S. at 33 (emphasis in original).

The defendants contend that the legislature still has time to

enact a plan, and they urge that this case be dismissed without prejudice, subject to refiling at some later date if the legislature remains at an impasse. Hopefully, the legislature will act, and will act soon. But it would be irresponsible to dismiss this case at this time. In light of the legislature's recent failure to pass a plan during the special session, this Court must be ready to act promptly in the event the stalemate continues.

The qualifying deadline for Congressional candidates is March 1, 2001. Miss. Code Ann. § 23-15-297(g); 23-15 299(3). The first primary will be held on June 4, 2001. *Id.*, § 23-15-1031. Any congressional redistricting plan for Mississippi, whether adopted by the legislature or this Court, must be submitted for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *Hathorn v. Lovorn*, 457 U.S. 255, 265 & n.16 (1982). Although the legislature still has an opportunity to enact a plan, time is running out.

The complaint in the present case has been filed and served on the defendants. A motion to intervene by separate parties has been filed and was granted orally on November 13, 2001, with a written order to follow. A conference of the parties will be held shortly to determine a course of pretrial proceedings so that this Court will be ready to go forward on the merits if the legislature does not enact a plan in the near future. Dismissal would not only require the parties and this Court to retrace these steps at some time in the future, but would prevent the parties and the Court from taking any additional steps to insure that the Court is prepared in the event the legislative impasse remains unresolved.

The adjournment of the special legislative session without passage of a plan, as well as the approaching deadlines, make this case ripe. The Court respectfully urges the legislature and

the Governor to renew their efforts to enact and implement a congressional redistricting plan, and to do so as soon as possible. In the event a plan is not adopted, the courts of the State of Mississippi must be ready to fulfill their obligation to insure that a lawful redistricting plan is implemented in a timely fashion.

Accordingly, the motion to dismiss is DENIED. A status conference will be held at 11:00 AM on Monday, November 19, 2001.

This 19th day of November, 2001.

/s/ Patricia D. Wise
CHANCERY COURT JUDGE

APPENDIX U

U.S. Department of Justice
Civil Rights Division

Washington, D.C. 20530

February 14, 2002

VIA FACSIMILE (601-359-3441)
& FIRST CLASS MAIL

The Honorable Michael Moore
Attorney General
Department of Justice
State of Mississippi
P.O. Box 220
Jackson, MS 39205-0220

Dear Mr. Attorney General:

This refers to the submitted changes for Mississippi's Congressional redistricting plan, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. Pursuant to the submission, the changes made are the following:

(a) Implementing a congressional redistricting plan drawn by the Chancery Court of the First Judicial District of Hinds County;

(b) Implementing a change in state law that allows a Chancery Court to draw a state-wide districting plan; and

(c) Creating a committee of the state legislature for the purposes of redistricting.

We received your submission on December 26, 2001; supplemental information was last received January 31, 2002.

Under the Voting Rights Act, a jurisdiction seeking to implement a proposed change affecting voting, must establish that, in comparison with the status quo, the change does not "lead to a retrogression" in the position of minority voters with respect to the "effective exercise of the electoral franchise." *See Beer v. United States*, 425 U.S. 130, 141 (1976). In addition, the jurisdiction must establish that the change was not adopted with an intent to retrogress. *Reno v. Bossier Parish School Board*, 528 U.S. 320, 340 (2000). Finally, the submitting authority has the burden of demonstrating that the proposed change has neither the prohibited purpose nor effect. *Id.* at 328; *see also Procedures for the Administration of Section 5* (28 C.F.R. 51.52).

The Attorney General does not interpose any objection to the change in voting procedure that creates a committee of the legislature to consider redistricting proposals. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Because the December 13, 2001 Order of the Mississippi Supreme Court (In re Mauldin No. 2081-M-01891), and the December 21 & 31, 2001 Orders of the Chancery Court which adopted a redistricting plan, are directly related, it would be inappropriate for the Attorney General to make a determination concerning the congressional redistricting plan adopted by the Chancery Court. See 28 C.F.R. 51.22(b); 51.35. By its

December 13 Order it is the Mississippi Supreme Court that granted the Chancery Court of Hinds County jurisdiction to adopt and direct the implementation of a congressional redistricting plan for the State of Mississippi.

Our analysis indicates that the information sent to date regarding this change in voting procedure is insufficient to enable us to determine that all or parts of the change do not have the purpose, and will not have the effect, of denying or abridging the right to vote on account of race, color, or membership in a language minority group, as required under Section 5. The following information is necessary so that we may complete our review of this portion of the submission.

1. A detailed description of the specific way(s) in which the change satisfies the requirements of Section 5. Please set forth any evidence the State contends supports the conclusion that this change will not have the purpose or effect of denying or abridging the right to vote on account of race or color.

2. Please provide the following information about the nature and structure of state courts, and the change in procedure granting Chancery Courts Jurisdiction to fashion state-wide redistricting plans:

   (A) Please explain the State's view of the legal basis for the Mississippi Supreme Court's decision to vest a Chancery Court with jurisdiction to create and implement a statewide redistricting plan. The basis for the Mississippi Supreme Court's decision is unclear.

   (B) Please explain the State's view of the relationship between this change in voting

procedure and Miss. Code Annot. 23-15-1039.

(C) Please explain and discuss whether any individual Chancery Court in the State can be granted, or may assert, jurisdiction to enact a state-wide congressional redistricting plan, and whether such court's jurisdiction may vest from a party filing suit in that court, or must first be specifically granted by a higher court in the state court system.

(D) Please provide detailed information about the nature and structure of state Chancery Courts, e.g., the number of Chancery Court judges; how Chancery Court judges are selected and whether those requirements are uniform state-wide; residency requirements applicable to Chancery Court judges; whether such judges are elected at-large or by districts; if by district, the demographic breakdown of the districts from which such judges are selected; the demographic breakdown of the Chancery Court judiciary; the limits imposed on Chancery Court jurisdiction, either by statute, common law, or state constitution; and whether local rules of practice vary among Chancery Courts.

(E) Please describe any safeguards in place to ensure that a particular Chancery Court judge who creates and imposes a state-wide redistricting plan has him/herself been selected in a manner reflecting the political influence of the State's minority populations. For example, may a Chancery Court judge, selected in a county that is 95% white and 5% black or other minority, impose a redistricting plan binding the entire State?

(F) Please describe the State's view as to whether a state Chancery Court would have jurisdiction to hear proceedings concerning, and later fashion and implement, state-wide reapportionment plans other than congressional plans.

(G) Please provide information regarding whether Chancery Courts historically have had jurisdiction to preside over proceedings involving state-wide redistricting plans and then themselves adopt and implement such plans.

(H) Please describe any existing legal procedure that would prevent a potential litigant from "forum shopping," or otherwise attempting to ensure, for strategic purposes, that a particular Chancery Court presides over redistricting proceedings.

(I) Please describe and explain any laws and/or court rules governing or otherwise impacting the selection of venue for state Chancery Courts.

(J) Please explain whether Chancery Court decisions are appealable, by right, by any party to the suit.

With respect to the actual congressional redistricting plan submitted by the State, we have concerns about the Department reviewing it while the plan, which was created by a Chancery Court, is pending final approval by the Mississippi Supreme Court on direct appeal. In that regard, please see the attached letter to the Chief Justice of that Court, sent this date. Please note that the Department is not formally seeking additional information regarding the redistricting plan, but it welcomes any additional comments or information the State wishes to provide on this issue.

* * *

The Attorney General has sixty days to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when we receive the information specified above, but we will make all efforts to expedite our review to the extent possible. *See Procedures for the Administration of Section 5* (28 C.F.R. 51.37). If no response is received within sixty days of this request, the Attorney General may object to the proposed changes consistent with the burden of proof placed upon the submitting authority. *See also* 28 C.F.R. 51.40; 51.52 (a) and (c). Changes that affect voting are legally unenforceable unless Section 5 preclearance has been obtained. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10. Therefore, please inform us of the action the State of Mississippi plans to take to comply with this request.

If you have any questions concerning this letter or if we can assist you in obtaining the requested information, you should call Chris Herren (202-514-1416). Refer to File No, 2001-4084 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

/s/ Joseph D. Rich
Joseph D. Rich
Chief, Voting Section

APPENDIX V

U.S. Department of Justice
Civil Rights Division

Washington, D.C. 20530

February 14, 2002

VIA FACSIMILE (601-359-2407)
& FIRST CLASS MAIL
The Honorable Edwin Lloyd Pittman
Chief Justice
Mississippi Supreme Court
Gartin Justice Building
4S0 High Street
Jackson, MS 39201

Dear Chief Justice Pittman:

I write with regard to the congressional redistricting plan recently submitted by the State of Mississippi to the United States Department of Justice (the "'Department") for preclearance under our Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, 28 C.F.R. Part 51. As you know, that plan, pursuant to an order of your honorable Court, was originally drafted by the Chancery Court of the First Judicial District of Hinds County after trial, and is now pending before your Court on direct appeal. *Mauldin v. Branch*, 2002-TS-00146 (filed January 25, 2002). Moreover, a federal court, in *Smith v. Clark*, No. 3:01-CV-855WS (S.D. Miss. filed Dec. 17, 2001), recently

ordered implementation of its own redistricting plan for the upcoming congressional election, "absent the timely preclearance of the redistricting plan adopted by the State Chancery Court."

The Department's Civil Rights Division is attempting to complete, as quickly as possible, its review of the plan submitted by the state. Legal developments surrounding the plan, however, present the Department with a unique situation: the plan was created in full, not by the State legislature, but by a local Chancery Court, and is now pending on appeal before the state's highest Court. Despite the pendency of that appeal, however, the plan has also been submitted to the Department for preclearance. Finally, a wholly separate plan has been drafted by a federal court, which will be imposed if the Department does not very soon complete its review of the State's submission.

It is the Department's view that, where possible, issues inherent to state-level governance should first be resolved by state authorities. Moreover, we are concerned with the practical aspects of ruling under Section 5 on a plan that realistically could be altered by the Mississippi Supreme Court. *See, e.g., Young v. Fordice*, 520 U.S. 273 (1997). Thus, I write to request respectfully that the Mississippi Supreme Court consider expediting its review of the appeal pending before it to the extent possible. In making this request, I am mindful of the many important matters pending before your Court and the Court's need to manage its docket in the manner it deems most appropriate. I greatly appreciate any assistance you may provide in this regard.

Finally, I am enclosing a copy of a letter sent this date to The Honorable Michael Moore, the Attorney General of the

State of Mississippi, seeking further information regarding the Mississippi Supreme Court's decision to repose in the Chancery Courts authority to create and impose redistricting plans. As you may know, in addition to objecting to or preclearing a submitted plan or other change in voting procedure, under the Voting Rights Act of 1965, 42 U.S.C. 1973c, 28 C.F.R. Part 51, the Department also is authorized to request further information on material aspects of a submission if required to determine if the submission complies with Section 5.

Thank you again for your consideration.

Sincerely,

/s/ Ralph F. Boyd, Jr.
Ralph F. Boyd, Jr.
Assistant Attorney General
Civil Rights Division

APPENDIX W

February 20, 2002

Via Hand Delivery
Honorable Henry T. Wingate
United States District Judge
245 East Capitol Street
Suite 109
Jackson, Mississippi 39201

Via Hand Delivery
Honorable E. Grady Jolly
Fifth Judicial Circuit Judge
202 James O. Eastland Courthouse
245 East Capitol Street
Jackson, MS 39201

Honorable David C. Bramlette, III
United States District Judge
725 Dr. Martin Luther King Blvd.
Biloxi, Mississippi
39530-2267

RE:*John Robert Smith, et al. v. Eric Clark, et al.*
U.S. District Court-Southern District-Jackson Division
Cause No. 3:01CV855 WS

Dear Judges Wingate, Bramlette, and Jolly:

Pursuant to the Court's letter of February 15, 2002, I am attaching for your information copies of the Mississippi Attorney General's response to the United States Justice Department's request for additional information as to the Chancery Court's redistricting plan and proceedings, along with the exhibits that were included. Under cover of this letter copies of these materials are also being distributed to all counsel. This response and exhibits were sent to the Justice

Department via Federal Express on February 19, 2002 and should have been received there this morning. The response itself was faxed to the Justice Department yesterday afternoon.

Pursuant to the Court's request in its February 15, 2002 letter we will immediately apprise the Court of further developments regarding this submission.

Sincerely,

/s/ T. Hunt Cole, Jr.
T. Hunt Cole, Jr.
Special Assistant Attorney General

Enclosures

cc: Arthur F. Jernigan, Jr. Esq.
Michael B. Wallace, Esq.
Robert B. McDuff, Esq.
Herbert Lee, Jr., Esq.
Carlton Reeves, Esq.
John G. Jones, Esq.

February 19, 2002

Mr. Joseph D. Rich, Chief,
Voting Section, Civil Rights
Division
Room 7254 - NWB
Department of Justice
1800 G St., N.W.
Washington, D.C. 20006

VIA FACSIMILE: (202) 616-9514

Re: State of Mississippi's Additional Information Pursuant to Correspondence of February 14, 2002, in Support of Congressional Redistricting Plan Adopted by the Chancery Court for the First Judicial District of Hinds County, Mississippi; Submission 2001-4084

Dear Mr. Rich:

The State of Mississippi hereby submits the additional information requested regarding its submission of the Congressional Redistricting Plan adopted by the Chancery Court for the First Judicial District of Mississippi, in accordance with Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973(c). This additional information is being supplied in response to correspondence date February 14, 2002 addressed to our office. Please note that the State of Mississippi has requested expedited consideration of its responses to the questions posed by the Department of Justice. Also, supporting documentation to our responses (the exhibits which are referenced) is being sent via Federal Express overnight as the cumulative nature of the material would preclude sending by facsimile transmission.

Thank you for your attention to this matter. If any additional information is needed, please advise. You may contact me by telephone at (601) 359-3803, by fax at (601) 359-5025, and by email at hwagn@ago.state.ms.us.

Sincerely,

/s/ Heather P. Wagner
Heather P. Wagner
Assistant Attorney General

Enclosures

SUBMISSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT OF 1965 AS AMENDED, 42 U.S.C. SECTION 1973(c)

TO: The Attorney General of the United States of America

RESPONSE TO REQUEST FOR ADDITIONAL INFORMATION REGARDING THE STATE OF MISSISSIPPI'S CONGRESSIONAL REAPPORTIONMENT PLAN AS ADOPTED BY THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

FILE NO. 2001-4084

EXPEDITED REVIEW REQUESTED

In accordance with the Department of Justice's February 14, 2002, request for additional information in connection with the Section 5 review of certain submitted changes for Mississippi's Congressional redistricting plan, the Attorney General for the State of Mississippi hereby submits the requested additional information to the U.S. Department of Justice.

Initially, it is noted that Attorney General Moore submitted the entire Chancery Court litigation record, including the

exhibits that were introduced by the adverse parties at the three day trial and the transcript of the trial proceedings, as well as the Chancery Court opinions and orders and the Mississippi Supreme Court order on the interlocutory request for writ of prohibition. In this litigation context, the record speaks for itself. The arguments for and against Chancery Court jurisdiction over congressional redistricting were presented to the Chancery Court and the Mississippi Supreme Court by the parties and were included in that record, and the Mississippi Attorney General was a party defendant, although not taking an active role in the trial. The case is still in litigation by an appeal to the Mississippi Supreme Court, which will at some juncture issue an opinion and judgment in the appeal, presumably including a final determination on the merits of the issue of Chancery Court jurisdiction. Accordingly, in these circumstances, it is improper to speculate on what the Mississippi Supreme Court was thinking when it issued its order in *In Re Mauldin*. Unlike the situation where typical legislative or executive action is concerned, we cannot in this instance, with the matter still in litigation, go "behind the record" to probe into the Chancery Court's or Supreme Court's motivation or speculate as to the substance or effect of any future ruling of the Mississippi Supreme Court, and indeed it would be untoward for us to do so as officers of the Court in the litigation.

With the foregoing limitations in mind, the State of Mississippi is unable to provide any further information as to some of your questions specifically requesting further information about the litigation itself, which is already reflected in the record we have already submitted. The record is what it is, and the definitive answers to many of your questions necessarily must come from the Chancery Court Order or the Mississippi Supreme Court itself. As indicated below, we will,

however, supply or identify general background information about the Chancery Court system in general.

1. A detailed description of the specific way(s) in which the change satisfies the requirements of Section 5. Please set forth any evidence the State contends supports the conclusion that this change will not have the purpose or effect of denying or abridging the right to vote on account of race or color.

   The change in voting procedures prompted by the Mississippi Supreme Court's order of December 13, 2001, holding that the Hinds County Chancery Court had jurisdiction to draw a congressional redistricting plan does not violate Section 5 of the Voting Rights Act. A decision by the highest state court in Mississippi vesting in chancery courts the jurisdiction to consider and adopt a congressional redistricting plan does not, in and of itself, constitute retrogressive effect. As to Section 5, there is no evidence of which we are aware that would indicate that such opinion or order was motivated by an intent to retrogress against minority voting strength or would have the effect of doing so with regard to congressional redistricting. Chancery Court judges are elected as provided by state law and are sworn to uphold the laws of the State of Mississippi. *See* Miss. Const. Article 6, §§ 153-154 (1890). In this regard, we would further note that, as indicated further below, the chancery court system and election districts have themselves been previously precleared.

   There is nothing contained in the Mississippi Supreme Court order of December 13, 2001, which provides a

basis for a determination of a retrogressive result by conferring jurisdiction upon a chancery court judge to adopt a congressional redistricting plan. Indeed, even if this concern had basis in evidence, law or fact, the preclearance procedures set in place under Federal law ensure that any plan drawn by a state court judge or any other governmental official(s), will be reviewed for compliance with Section 5 of the Voting Rights Act.

Further, there is no evidence to support a finding that allowing a state court to proceed forward and draw a congressional redistricting plan in the face of Miss. Code Ann. Section 23-15-1039, providing for at-large election in the event no plan is in place by the time for congressional elections, in circumstances in which the state is losing a congressional seat, has a retrogressive purpose or effect.

2. Please provide the following information about the nature and structure of state courts, and the change in procedure granting Chancery Courts jurisdiction to fashion state-wide redistricting plans:

   (a) Please explain the State's view of the legal basis for the Mississippi Supreme Court's decision to vest a Chancery Court with jurisdiction to create and implement a statewide redistricting plan. The basis for the Mississippi Supreme Court's decision is unclear.

   Under the Constitution of the State of Mississippi, the Mississippi Supreme Court is the final arbiter of decisions pertaining to matters of state law. *See* Miss. Const. Article 6, Sections 144, 146. It has "such

jurisdiction as properly belongs to a court of appeals . . .". Miss Const. Article 6, § 146; Miss Code Ann. § 9-3-9 (Supp. 2001). *(Exhibit 1)*. In this matter, the Mississippi Supreme Court has exercised its authority and conferred jurisdiction upon a chancery court to adopt a congressional redistricting plan. For the reasons previously stated, the Mississippi Attorney General has neither the power nor authority to go behind what the Mississippi Supreme Court has held and attempt to speculate as to its rationale for that holding.

(b) Please explain the State's view of the relationship between this change in voting procedure and Miss. Code Ann. Section 23-15-1039.

As described in our original submission, the adoption of a single member district plan by the Chancery Court is a departure from the legislatively prescribed at-large temporary remedy of Section 23-15-1039 where a congressional seat is lost. As indicated by the Chancery Court record, the parties argued over whether Section 23-15-1039 should be applied, although at trial both sides pushed single member district plans. The plaintiffs in state court argued that the use of the at-large method of election might result in dilution of black voting strength. The unquestioned preference of courts and legislatures at this time is for the single-member congressional districts rather than the use of at-large congressional election plans.

(c) Please explain and discuss whether any individual Chancery Court in the State can be granted, or may assert, jurisdiction to enact a state-wide congressional redistricting

plan, and whether such court's jurisdiction may vest from a party filing suit in that court, or must first be specifically granted by a higher court in the state court system.

The Order of the Mississippi Supreme Court, on interlocutory petition for writ of prohibition, in *In re Mauldin*, No. 2001-01891, is specific in its finding that the Chancery Court of the First Judicial District of Hinds County had jurisdiction over the drafting and implementation of a state-wide congressional redistricting plan.

(d) Please provide detailed information about the nature and structure of state Chancery Courts, e.g., the number of Chancery Court judges; how Chancery Court judges are selected and whether those requirements are uniform state-wide; residency requirements applicable to Chancery Court judges; whether such judges are elected at-large or by districts; if by district, the demographic breakdown of the districts from which such judges are selected; the demographic breakdown of the Chancery Court judiciary; the limits imposed on Chancery Court jurisdiction, either by statute, common law, or state constitution; and whether local rules of practice vary among Chancery Courts.

There are forty-five (45) Chancery Court judges in the State of Mississippi elected from twenty (20) Chancery Court districts. The method of election of these judges is uniform state-wide as provided in Article 6, § 153 of the Mississippi Constitution and Miss. Code Ann. §§ 9-5-1, *et seq.* (attached hereto as *Exhibit 2*). As to residency, "[a] chancellor shall be a resident of the district in which he serves but shall not be required to be a resident of the subdistrict if the

district is divided into subdistricts." Miss. Code Ann. § 9-5-1 (Supp. 2001). Chancery Court judges are elected by district as set forth above and as reflected by the attached statutes. The preceding chancery court structure has been precleared by the U.S. Attorney General on September 6, 1994, on which date the U.S. Attorney General precleared Chapter 564, Laws of 1994. A copy of the letter evidencing that preclearance is attached hereto and incorporated herein by reference. (*Exhibit 3*). The submission and information supplied in support of that previous submission is maintained in your files and is incorporated herein by reference.

The demographic breakdown of each Chancery Court district as drawn in 1994 and as currently exist based upon the 2000 Census data is attached hereto. (*Exhibit 4*). As to the demographic breakdown of the Chancery Court judiciary, candidates for the judiciary are not required to specify race in qualifying for such position. Therefore, a document setting forth the demographic breakdown of the chancery judiciary is not available. However, a list of the currently sitting chancellors is attached hereto. (*Exhibit 5*). To the best of the State's knowledge, the following chancellors represent minority groups: Patricia D. Wise and Denise Owens (District 5), Ceola James and Vicki R. Barnes (District 9), Gail Shaw-Pierson (District 11), Dorothy Colom (District 14) and Kennie Middleton (District 17). Of the 45 Chancellors, 10 are women.

The jurisdiction of Chancery Courts is set forth in Article 6, §§ 159-161 and Miss. Code Ann. §§ 9-5-81,

et seq., attached hereto. (*Exhibit 6*). Sections 11-5-1 et seq. contain general provisions for practice and procedures in chancery courts. Rule 1 of the Mississippi Rules of Civil Procedure provides that those rules are applicable to procedures in chancery court. Additionally, Rule 81 of the Mississippi Rules of Civil Procedure establish the applicability of the Mississippi Rules of Civil Procedures to certain actions. All Chancery Courts in the State of Mississippi are governed by the Uniform Chancery Court Rules, attached hereto. (*Exhibit 7*). As to local rules, while we understand such may exist, none may be in conflict with the Uniform Rules of Chancery Practice or other rules or statutes.

(e) Please describe any safeguards in place to ensure that a particular Chancery Court judge who creates and imposes a state-wide redistricting plan has him/herself been selected in a manner reflecting the political influence of the State's minority populations. For example, may a Chancery Court judge, selected in a county that is 95% white and 5% black or other minority, impose a redistricting plan binding in the entire state?

As set forth in response 2(d), the current method for election of chancery court judges and the current chancery court structure and districts were approved by the Justice Department under Section 5.

The Mississippi Supreme Court has issued its order, granting authority to the Hinds County Chancery Court to draft and implement a congressional redistricting plan. We know of no circumstances in which court jurisdiction would depend upon racial demographics.

(f) Please describe the State's view as to whether a state Chancery Court would have jurisdiction to hear proceedings concerning, and later fashion and implement, state-wide reapportionment plans other than congressional plans.

The Order of the Supreme Court does not address this question. The jurisdiction of a Chancery Court to hear proceedings and fashion and implement reapportionment plans other than congressional plans is a matter to ultimately be decided by the State's highest court of competent jurisdiction, which is the Mississippi Supreme Court, as set forth in paragraph 2(a), *supra*. With respect to a legislative deadlock in the reapportionment of the state House of Representatives and the State Senate, Section 254 of the State Constitution provides for a commission of five elected officials to adopt a redistricting plan as the final authority. (*Exhibit 8*).

(g) Please provide information regarding whether Chancery Courts historically have had jurisdiction to preside over proceedings involving state-wide redistricting plans and then themselves adopt and implement such plans.

The State is aware of several cases which hold that a chancery court lacks the jurisdiction to entertain suits challenging congressional redistricting plans for Mississippi. (p. 4, Submission 2001-4084). The MS Supreme Court has ruled that a chancery court has jurisdiction to preside over proceedings involving state-wide redistricting plans. All of the relevant authorities addressing this issue were fully briefed by the parties to the litigation in the Chancery Court and are contained in the written materials filed in the

Court record by those parties, which were attached to the original submission as Appendix B.

(h) Please describe any existing legal procedure that would prevent a potential litigant from "forum shopping," or otherwise attempting to ensure, for strategic purposes, that a particular Chancery Court presides over redistricting proceedings.

The method for determining where a suit is to be filed is governed by the venue statutes (*see infra* subsection (i)) applicable to chancery court proceedings. Each chancery court in the State of Mississippi has its own internal rules for assigning cases to particular judges. The local rules vary from jurisdiction to jurisdiction. In the 5th Chancery Court District (Hinds County), when contested matters are filed and entered into the computer, the computer selects, at random, the chancellor to preside over each matter. The State of Mississippi cannot, with certainty, describe the procedures that have been adopted in other districts, nor can the State represent or certify that at all times local procedures are followed.

(i) Please describe and explain any laws and/or court rules governing or otherwise impacting the selection of venue for state Chancery Courts.

In Mississippi, venue is controlled by statute. Mississippi Code § 11-5-1 sets forth the venue for matters in the chancery courts. Venue is proper and cases "may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be found." Miss. Code Ann.

§ 11-5-1 (1991). (*Exhibit 9*).

(j) Please explain whether Chancery Court decisions are appealable, by right, by any party to the suit.

> Appeals in Mississippi are governed and controlled by the Mississippi Rules of Appellate Procedure. Rule 3 sets forth the procedure for taking appeals from the Chancery Court to the Mississippi Supreme Court. Miss. R. App. Proc. R.3. Pursuant to Mississippi Code § 11-51-3, "an appeal may be taken to the Supreme Court from any final judgment of a . . . chancery court in a civil case . . .by any of the parties or legal representatives of such parties. . . ." Miss. Code Ann. § 11-51-3 (Supp. 2001). (*Exhibit 10*).

If the Attorney General of the United States needs any further information concerning this submission or this additional information, the State of Mississippi will attempt to supply it.

Again, pursuant to 28 C.F.R. Section 51.34, the State of Mississippi requests that the U.S. Justice Department afford this supplemental information expedited consideration and review.

This the 19th day of February, 2002.

Respectfully Submitted,

STATE OF MISSISSIPPI

By: /s/ Heather Wagner
Mike Moore
Attorney General
State of Mississippi

Attorney and Chief Legal Officer for
the State of Mississippi

Heather P. Wagner
Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205-0220

[Exhibits Omitted in Printing]

APPENDIX X

IN THE CHANCERY COURT OF THE FIRST
JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER;
L.C. DORSEY; DAVID RULE; MELVIN HORTON;
JAMES WOODARD; JOSEPH P. HUDSON; and
ROBERT NORVEL PLAINTIFFS

V. NO. G-2001-1777 W/4

ERIC CLARK, Secretary of State of
Mississippi; Mike Moore, Attorney General
of Mississippi; Ronnie Musgrove, Governor
of Mississippi DEFENDANTS

CAROLYN MAULDIN, STACY SPEARMAN,
DAVID MITCHELL, and JAMES CLAY
HAYS, JR, INTERVENORS

(Filed Dec. 26, 2001)

CERTIFICATE OF COMPLIANCE

COME NOW the State Defendants in the above-styled matter and file with this Court a Certificate of Compliance pursuant to the direction of the Opinion and Order of the Court dated December 21, 2001, and in so doing would show unto this Honorable Court the following, to-wit:

I. That due to significant disruptions in the receipt of mail by the U.S. Department of Justice, Civil Rights Division, Voting Section, that entity has

prescribed special temporary procedures to be utilized in making submissions for administrative review under Section 5 of the Voting Rights Act of 1965. A copy of those special temporary procedures is attached hereto as Exhibit 1.

II. That, pursuant to those special temporary procedures, the State of Mississippi has communicated with the U.S. Department of Justice, Civil Rights Division, Voting Section, regarding its submission to that entity of the plan adopted by the Court and supporting documentation.

III. That the State of Mississippi is proceeding with its submission based upon directions as received from the Voting Section. Those directions instructed our office to transmit to the Voting Section, by facsimile transmission, certain initial documentation, which included the Opinion and Order of the Court, dated December 21, 2001, and the attachments thereto; the Order of the Mississippi Supreme Court dated December 13, 2001; the current congressional districts as established by Section 23-15-1037; and the existing statute regarding at-large districts.

IV. That, as a result of this initial facsimile transmission, the Voting Section has advised that the statutory sixty (60) day period for review will begin today, December 26, 2001. The Court should note that while the Attorney General of Mississippi requested expedited consideration of this submission, the Justice Department is not

bound to honor that request, and is only mandated to complete its review within sixty (60) days. Please see the attached correspondence which is included as Exhibit 2 to this certificate, acknowledging the receipt of the State's submission and the beginning of administrative review pursuant to Section 5.

V. Again, following guidance provided by the Justice Department, the State intends to finalize its submission on Thursday, December 27, 2001, by hand-delivering remaining materials to the U.S. Justice Department, Civil Rights Division, Voting Section, at its offices in Washington, D.C. The State will include election data from prior years elections, the entire transcript of the proceedings in Chancery Court, all exhibits considered by the Court and the Court file. At the time the information was sent by facsimile, that information from the Court had not yet been received from officers of the Court. Separation of that information into separate transmissions may result in confusion or loss of data. The Court will be advised upon the completion of delivery of this additional information to the Voting Section.

RESPECTFULLY SUBMITTED, this the 26th day of December, 2001.

ERIC CLARK, Secretary of State of Mississippi;
MIKE MOORE, Attorney General of Mississippi;
RONNIE MUSGROVE, Governor of Mississippi,
Defendants

By: MIKE MOORE, ATTORNEY GENERAL

By: /s/ Heather P. Wagner
Heather P. Wagner, MSB #9425
Assistant Attorney General

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205-0220
(601) 359-3680

[certificate of service omitted in printing]

[Exhibit 1 omitted in printing]

[Exhibit 2 to certificate of compliance]

U.S. Department of Justice
Civil Rights Division

Voting Section
P.O. Box 66128
Washington, D.C. 20035-6138

December 26, 2001

TRANSMITTAL SHEET

TO:

NAME: Heather P. Wagner, Assistant Attorney General

OFFICE: Office of the Attorney General for the State of Mississippi

TELEFACSIMILE: 601/359-5025

FROM:

Robert S. Berman
Deputy Chief, Voting Section
Civil Rights Division
Department of Justice
Room 7243 NWB
950 Pennsylvania AV, N.W.
Washington, D.C. 20530
202/514-8690 (office)
202/307-2569 (telefacsimile)

RE: Submission of congressional redistricting plan for administrative review under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

This transmittal consists of 2 pages including the cover page.

The original of this document will not be sent.

STATEMENT ACKNOWLEDGING RECEIPT OF SUBMISSION OF THE REDISTRICTING PLAN FOR THE STATE OF MISSISSIPPI FOR ADMINISTRATIVE REVIEW PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT OF 1965

I, Robert S. Berman, Deputy Chief, Voting Section, Civil Rights Division, U.S. Justice Department, acknowledge receipt, from and on behalf of the sovereign State of Mississippi, the plan for congressional redistricting of the State of Mississippi as ordered by Chancery Court of the First Judicial District of Hinds County, Mississippi, for the purpose of administrative review pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. This submission has been made according to special temporary procedures adopted by the Voting Section for receiving Section 5 submissions. I also acknowledge that the receipt of this redistricting plan on this date will commence the sixty (60) day time period for administrative review under Section 5 of the Voting Rights Act.

This the 26th day of December, 2001.

/s/ Robert S. Berman
Robert S. Berman
Deputy Chief, Voting Section
Civil Rights Division
U.S. Department of Justice

APPENDIX Y

STATE OF MISSISSIPPI

OFFICE OF THE ATTORNEY GENERAL

MIKE MOORE
ATTORNEY GENERAL

OPINIONS
DIVISION

December 26, 2001

Mr. Joseph D. Rich, Acting Chief
Voting Section, Civil Rights Division
Department of Justice
1800 G Street N.W.
Room 7254
Washington, D.C. 20006

Re: Submission by the State of Mississippi of Congressional Redistricting Plan Pursuant to Opinion and Order of the Chancery Court of the First Judicial District of Hinds County, Mississippi

EXPEDITED CONSIDERATION AND PRECLEARANCE BY JANUARY 31, 2002, REQUESTED

Dear Mr. Rich:

On behalf of the State of Mississippi, I hereby submit for preclearance under Section 5 of the Voting Rights Act of 1965,

as amended and extended, 42 U.S.C. Section 1973c, the enclosed copy of the above-referenced submission.

2002 is a regular congressional election year in the State of Mississippi. The deadline for candidate qualification is March 1, 2002. So that the public and candidates will have adequate time to become familiar with the congressional districts upon preclearance, *the State of Mississippi respectfully requests that the Attorney General of the United States grant this matter expedited consideration and that the Attorney General preclear this submission no later than January 31, 2002.*

In light of, and in compliance with, the temporary procedures for submissions adopted by the Justice Department, the State of Mississippi is sending its initial preclearance documentation via facsimile to the number specified for that purpose: (202)305-4719. Further documentation will be forthcoming in both electronic format and hard copies. It is our understanding that receipt of this facsimile transmission will constitute a "filing" with the Department. The State of Mississippi respectfully requests that receipt of our submission be acknowledged by return fax indicating the file number assigned to this submission. We are presently operating under an Order of the Chancery Court of the First Judicial District of Hinds County, Mississippi, which requires our office to file a certificate of compliance with that Court no later than 5:00 p.m. on December 26, 2001, advising the Court that the State's submission has been filed.

A complete copy of this submission is on file for inspection by the public during normal business hours in the offices of the Attorney General of the State of Mississippi, Carroll Gartin Justice Building, 450 High Street, 5th Floor, Jackson, Mississippi 39201, (601) 359-3680.

Again, additional documentation will be forthcoming pending further contact from your office on the method, manner and mode to be used for transmitting it to your offices. Thank you for your consideration of this submission. Please notify us by fax (601-359-5025) and phone (601-359-3803) of the action taken on this submission. If you have any questions concerning this submission, please contact Heather Wagner, Assistant Attorney General (601-359-3803).

Sincerely,

MIKE MOORE, ATTORNEY GENERAL
STATE OF MISSISSIPPI

By: /s/ Heather P. Wagner
Heather P. Wagner
Assistant Attorney General

HPW/dm

enclosures:

1. Submission by the State of Mississippi of Congressional Redistricting Plan pursuant to the Opinion and Order of the Chancery Court of the First Judicial District of Hinds County, Mississippi

2. Opinion and Order of the Chancery Court of the First Judicial District of Hinds County, Mississippi

3. Order of the Mississippi Supreme Court

4. Section 23-15-1039 of the Mississippi Code of 1972, Annotated, as amended

5. Section 23-15-1037 of the Mississippi Code of 1972, Annotated, as amended, and maps and data regarding current Mississippi congressional districts

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SUBMISSION UNDER SECTION 5 OF THE
VOTING RIGHTS ACT OF 1965
AS AMENDED, 42 U.S.C. SECTION 1973(c)

TO: The Attorney General of the
United States of America

SUBMISSION BY THE STATE OF MISSISSIPPI OF
CONGRESSIONAL REDISTRICTING PLAN
PURSUANT TO OPINION AND ORDER OF THE
CHANCERY COURT
OF THE FIRST JUDICIAL DISTRICT OF HINDS
COUNTY, MISSISSIPPI

Expedited Consideration and Preclearance Requested In
View of
March 1, 2002, Deadline for Candidate Qualification

Pursuant to Section 5 of the Voting Rights Act of 1965, as amended and extended, 42 U.S.C. Section 1973(c) [hereinafter referred to as Section 5] and the U. S. Department of Justice's Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, 28 C.F.R. Sections 51.1, *et seq.* (1987), the State of Mississippi, by and through the Attorney General of the State of Mississippi, respectfully

submits to the Attorney General of the United States for Section 5 preclearance the complete and certified copy of the Opinion and Order of the Chancery Court of the First Judicial District of Hinds County, Mississippi, dated December 21, 2001, redrawing the Congressional Districts for the State of Mississippi [hereinafter sometimes referred to as "the Order", and/or instant submission]. In making this submission, the State of Mississippi hereby expressly reserves and does not waive any and all objections it may have concerning whether the instant submission, or any parts thereof, is subject to the preclearance requirements of Section 5.

Pursuant to 28 C.F.R. Section 51.34, the State of Mississippi requests expedited consideration of this submission. In support of its request for expedited consideration, the State of Mississippi would show the following: that the Mississippi Legislature failed to adopt a redistricting plan for Mississippi's congressional seats, that the Chancery Court for the First Judicial District of the State of Mississippi adopted a redistricting plan for the newly configured congressional seats for the State of Mississippi, and that this plan was issued in the form of an Opinion and Order dated December 21, 2001. For upcoming 2002 elections, the statutory deadline for qualification of candidates is March 1, 2002. Serious candidate and voter confusion may occur should this submission not receive consideration and review, and ultimate approval, in advance of the usual sixty day period the Department is allotted for administrative review. The State of Mississippi requests that it receive proper review of this submission no later than January 31, 2002, to allow candidates and voters to fully understand the newly enacted district lines prior to the qualifying deadline of March 1, 2002.

For this submission, the State of Mississippi respectfully

states as follows:

28 C.F.R. Section 51.27(a).

A certified copy of the Opinion and Order of the Chancery Court of the First Judicial District of Hinds County, Mississippi, Honorable Patricia Wise, Chancellor, issued on December 21, 2001, in the matter of *Beatrice Branch; Rims Barber; L.C. Dorsey; David Rule; Melvin Horton; James Woodard; Joseph P. Hudson; and Robert Norvel vs. Eric Clark, Secretary of State of Mississippi; Mike Moore, Attorney General of Mississippi; Ronnie Musgrove, Governor of Mississippi,* Hinds County Chancery Court Civil Action No. G-2001-1777 W/4, is attached hereto as Appendix A. The entire court file in the above-referenced civil action is attached hereto and incorporated herein as Appendix B. The complete record in the above-referenced civil action, consisting of transcripts of the proceedings and exhibits presented to and considered by the Chancellor, are attached hereto and incorporated herein as Appendix C. At various points within this submission, reference will be made to certain exhibits contained in Appendix C by the original exhibit number in the Chancery proceedings.

28 C.F.R. Section 51.27(b).

The Opinion and Order of the Chancery Court re-draws Congressional Districts for the State of Mississippi. Section 23-15-1037 of the Mississippi Code of 1972, as amended, which establishes the current congressional district lines, has not been amended, and is attached hereto as Appendix D. Further, attached hereto as Exhibit 25 to the Chancery proceedings, contained in Appendix C hereto, is a map of the current Congressional Districts.

28 C.FR. Section 51.27(c).

Submitted for approval of the Justice Department under Section 5 are the following:

1. The Opinion and Order of the Chancery Court of the First Judicial District of Hinds County, Mississippi, entered December 21, 2001, in *Branch, et al. v. Clark, et al., supra*, substantively adopting a new congressional redistricting plan for Mississippi based on the 2000 census results and reflecting the federal reapportionment of congressional seats for Mississippi from 5 members to 4 members. In this regard it is noted that the Opinion and Order of the Chancery Court are subject to the possibility of an appeal by the parties to the Mississippi Supreme Court, an that the Attorney General of Mississippi will advise the Justice Department of the existence and status of any such appeal.

The Attorney General further submits for approval under Section 5 standards the following additional matters which may constitute a covered change with respect to the method, manner, procedure, or transfer of authority to adopt the congressional redistricting plan, different from that in effect on November 1, 1964, or that constitutes a departure by the Chancery Court Order and Judgment from existing Mississippi statutory law precleared as a part of the State Election Code in 1986, as follows:

2. The orders of the Chancery Court of the First Judicial District of Hinds County in *Branch v. Clark, supra*, and the related Order of the Supreme Court in Mississippi in *In Re Carolyn Mauldin*, No. 2001-M-1892, entered on December 13, 2001, all holding or asserting that a chancery court in Mississippi has the authority and jurisdiction to hear and

determine a congressional redistricting suit and to issue a new congressional redistricting plan as a remedy for the State of Mississippi where the Legislature has failed to adopt such a plan in a timely manner. A copy of the Supreme Court Order is attached hereto and incorporated herein as Appendix E. Historically, the State Legislature enacts congressional redistricting plans for the State of Mississippi. In 1932, the Mississippi Supreme Court held that the State chancery courts and the State circuit courts did not have jurisdiction to entertain suits challenging congressional redistricting plans for Mississippi. *Brumfield v. Brock*, 169 Miss. 784, 142 So. 2d 745 (1932). Wood v. Gillespie, 169 Miss. 790, 142 So. 747 (1932). Insofar as can be determined, those cases had not been overruled or questioned as of the benchmark date of November 1, 1964, nor had a State chancery or circuit court otherwise issued a congressional redistricting plan as of that date. In the instant matter, as set forth in the Opinion of the Chancery Court, the Legislature did not enact a congressional redistricting plan based on the federal reapportionment as a result of the 2000 census, and the State chancery court assumed jurisdiction of a one-man, one-vote lawsuit demanding that the Chancery Court enact a plan. To the extent that the Chancery Court's adoption of a congressional redistricting plan for Mississippi in court proceedings, instead of by State legislative enactment, constitutes a covered change with respect to the method, manner, procedure, or transferral of authority to adopt a congressional redistricting plan different from that in force on November 1, 1964, such change does not have the purpose or effect of retrogressively abridging or denying the right to vote based on race.

3. The Opinion and Order of the Chancery Court in *Branch v. Clark, supra*, to the extent that it constitutes a departure from Miss. Code Ann. Section 23-15-1039, precleared by the Justice

Department in 1986 as a part of the Mississippi Election Code, and which sets forth an at-large method of election of members of Congress for Mississippi as a temporary remedy where the State is decreasing its numbers of seats in Congress due to federal reapportionment and no new districting plan has been adopted. A copy of Section 23-15-1039 is attached hereto and incorporated herein by reference as Appendix F. The Chancery Court Order and Judgment does not follow or adopt the at-large provisions of Section 23-15-1039, and instead adopts a congressional redistricting plan for Mississippi based on single member districts and one-man one-vote principles. In this regard, it is noted that an at-large method of election may have the potential for being retrogressive with regard to black electoral voting strength, and that single member districts are now the favored standard for congressional reapportionment. For Section 5 purposes, the Chancery Court's adoption of single member districts for congressional redistricting, rather than an at large method of election, did not have the purpose or effect of retrogressively abridging or denying the right to vote because of race.

28 C.F.R. Section 51.27(d).

As directed by the Order of the Chancery Court, the person making this submission is Mike Moore, the Attorney General of and the Chief Legal Officer for the State of Mississippi, whose address is Post Office Box 220, Jackson, Mississippi, 39205, and whose telephone number is (60l) 359-3680.

28 C.F.R. Section 51.27 (e).

The name of the submitting authority is the State of Mississippi and the jurisdiction responsible for the change is the Chancery Court of the First Judicial District of Hinds

County, Mississippi.

28 C.F.R. Section 51.27 (f).

Not applicable.

28 C.F.R. Section 51.27 (g).

The Chancery Court of the First Judicial District of Hinds County, Mississippi, is responsible for making these changes by judicial act.

28 C.F.R. Section 51.27 (h).

The Chancery Court of the First Judicial District of Hinds County, Mississippi, assumed jurisdiction of the matter. The Mississippi Supreme Court on December 13, 2001, issued an Order recognizing the jurisdiction of the Chancery Court over the issues. Appendix E.

28 C.F.R. Section 51.27 (i).

The Order was issued December 21, 2001.

28 C.F.R. Section 51.27 (j).

The Order will be effective from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965.

28 C.F.R. Section 51.27 (k).

The instant submission has not yet been enforced or administered.

28 C.F.R. Section 51.27 (l).

The instant submission affects the entire State of Mississippi.

28 C.F.R. Section 51.27 (m).

See Opinion and Order of the Court (Appendix A).

28 C.F.R. Section 51.27 (n).

The instant submission does not and will not adversely affect racial or language minority groups. The instant submission does not affect language minority groups as such. The instant submission does not have the purpose, and it does not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The changes are not in any manner retrogressive of the voting strength of minorities. With regard to the substantive adopting of the new congressional redistricting plan for the State, the submitted change constitutes a significant enhancement of black voting strength in the State of Mississippi. Due to the reduction in the number of representatives, the retention of the majority-minority district (District 2) results in a relative increase in power - election of a minority candidate representing one-fourth (1/4) of the Mississippi delegation, rather than the one-fifth (1/5) under the current plan. Further, any reduction in the percentage of black voting age population in District 2 is minimal, and would not substantially impair the ability of minorities to elect the candidate of their choice. As can be seen from Exhibit 26 to the Court proceedings contained in Appendix C, the percentage of black voting age population in existing District 2 is 61.3% and under the Court's plan, based upon 2000 Census data, it

would be 59.03%, an insubstantial reduction, and not one which would adversely impact black voting power in that District.

28 C.F.R. Section 51.27 (o).

The State of Mississippi is aware of pending litigation regarding this submission.

(1) As mentioned previously, the Mississippi Attorney General is aware of the substantial likelihood that the Opinion and Order of the Chancery Court will be appealed to the Mississippi Supreme Court. As of the preparation of this submission, no such appeal has been taken. However, the Mississippi Attorney General will appraise the Justice Department if and when such appeal is taken.

(2) There is also currently pending in the U.S. District Court for the Southern District of Mississippi an action which could substantially impact the review of this submission by the Justice Department. The case of *John Robert Smith, Shirley Hall, and Gene Walker v. Eric Clark, Secretary of State of Mississippi; Mike Moore, Attorney General for the State of Mississippi; Ronnie Musgrove, Governor of Mississippi; Mississippi Republican Executive Committee; and Mississippi Democratic Executive Committee,* Case No. 3:01cv855WS, is currently pending. Attached hereto and incorporated herein as Appendix G are the Complaint, the Plaintiffs' Motion for Leave to Amend Complaint and for Preliminary Injunction, the State Defendants' Response to Plaintiffs' Motion for Leave to Amend Complaint and for Preliminary Injunction, and the Order of the three-judge panel holding that unless it is clear to that panel by January 7, 2002, that the State authorities can have a redistricting plan in place in time for the qualifying

deadline of March l, 2002, the panel will at that time expeditiously rule on the Motion for a Preliminary Injunction.

28 C.F.R. Section 51.27 (p).

The current Congressional districts have been precleared under Section 5. The current apportionment and districts of the Mississippi Congressional districts are established by Section 23-15-1037 of the Mississippi Code of 1972 (as enacted by Laws, 1991 Extra Session, Chapter 2, Section 1). It was precleared under Section 5 by the U.S. Attorney General by a letter dated February 21, 1992, a true and correct copy of which is attached to this submission as Appendix H and incorporated herein by reference.

In the past, Congressional Districts have been drawn by the Standing Joint Committee on Congressional Redistricting pursuant to Sections 5-3-121, 5-3-123, 5-3-125 and 5-3-127. Plans are submitted to the Governor and the full Legislature pursuant to Section 5-3-129. These procedures were enacted by Laws 1981, Ch. 302. It does not appear that Chapter 302, Laws of 1981, was ever submitted to the Department for administrative review pursuant to Section 5 of the Voting Rights Act of 1965. To the extent necessary, this chapter law is hereby submitted at this time for administrative review pursuant to Section 5. A copy of Chapter 302, Laws of 1981 is attached hereto and incorporated herein as Appendix 1. The assumption of jurisdiction by the Chancery Court has not previously been submitted for preclearance. To the extent necessary, this procedure is hereby submitted at this time for administrative review pursuant to Section 5 of the Voting Rights Act of 1965. The State of Mississippi hereby expressly reserves and does not waive any and all objections it may have concerning whether this chapter law is subject to the

preclearance requirements of Section 5.

Section 23-15-1039, which provides for at-large elections was enacted by Laws 1986, Ch. 495, Section 308, which was precleared under Section 5 by the U.S. Attorney General by a letter dated December 31, 1986, a true and correct copy of which is attached to this submission as Appendix J. The deviation from the statutory procedures set forth by Section 23-15-1039 for conducting at-large elections has not previously been submitted for preclearance. To the extent necessary, this deviation is hereby submitted at this time for administrative review pursuant to Section 5 of the Voting Rights Act of 1965. The State of Mississippi hereby expressly reserves and does not waive any and all objections it may have concerning whether this chapter law is subject to the preclearance requirements of Section 5.

28 C.F.R. Section 51.27 (q).

Because this submission involves a redistricting of congressional districts, the available and relevant information suggested by Section 51.28 is submitted below.

28 C.F.R. Section 51.27 (r).

As the instant submission involves a redistricting, the State of Mississippi submits the available and relevant information listed in Section 51.28.

28 C.F.R. Section 51.28

(a) Demographic Information.

(l) Please refer to Exhibit 26 of the court proceedings

containing statistical tables and Exhibit 25, a map, attached as part of Appendix C, which report the population and voting age population by race for the current Mississippi Congressional Districts as enacted in by Laws, 1991 Extra Session, Chapter 2, Section 1, which was precleared on February 21, 1992. Please also refer to the Court's Opinion and Order and attachments thereto, which contain statistical tables with a map which report the population and voting age population by race based upon the 2000 Census for the Mississippi Congressional Districts as established by the Opinion and Order. No data was presented to the Court regarding language groups.

(2) Please refer to the attachment to the Court's Opinion and Order entitled "Summary Report - Branch Plaintiffs Plan 2A - Zero Deviation."

(3) Any estimates of population by race and language group, made in connection with the change may be found in the court record and exhibits, as well as the Opinion and Order of the Chancery Court.

(4) Information provided to the Department for review pursuant to this Section is being provided in the format presented to the Court by the parties in the Chancery Court action, and to the Mississippi Attorney General by the Court and the parties. The Attorney General cannot state that it comports to the requirements specified by the Department for such data.

(5) Please see above response.

(b) Maps.

(1) See Order and Opinion and attachments thereto

(Appendix A) and Appendix C:

Exhibits 25 and 26 (existing boundaries and population calculations).

(2) See Opinion and Order and attachments.

(3) See Opinion and Order and attachments.

(4) See Opinion and Order of the Court.

(5) Not applicable as there are no new polling places established by this submission.

(6) Not applicable as there are no new voter registration sites established by this submission.

(c) Annexations.

Not applicable.

(d) Election Returns.

Exhibit 58 to the Chancery Court proceedings, contained in Appendix C, was a certified copy of election returns for the 2000 and 1998 Congressional Elections in the State of Mississippi, provided by the Mississippi Secretary of State. Please refer to Appendix K, attached hereto and incorporated herein by reference, which contains election returns for the regular Congressional Elections for the years 2000, 1998, 1996, 1994, 1992 and for the special election for District 2 in 1993. Specific data by precinct level is available to a limited extent, and can be provided to the Justice Department if necessary.

(e) Language Usage.

The submitted chapter law does not affect the use of language in the electoral process.

(f) publicity and participation.

This submission has been the subject of controversy, however, public notice and public hearings were not conducted by the Chancery Court. The Court proceedings were open at all times to members of the public. Although public hearings were conducted by the Standing Join Committee on Congressional Redistricting, evidence of those hearings was not presented to nor considered by the Court.

(g) Availability of the Submission.

(1) The instant submission will be noticed on the Attorney General's website. Additionally, a copy will be available for public review at this office of the MS Attorney General.

(h) Minority Group Contacts.

The following black adult citizens of Mississippi can be expected to be familiar with the instant submission or have been active in the political process:

Representative Bennie G. Thompson
United States House of Representatives
Second District of Mississippi
Congressional Office Address:
107 W. Madison Street
Bolton, MS 39056
(601) 866-9003

Senator Henry J. Kirksey
Mississippi Senate (fmr.)
620 Faculty Drive
Tougaloo, Mississippi
(60l) 957-0688

Judge Patricia Wise, Chancellor
Post Office Box 686
Jackson, Mississippi 39205-0686
(601) 968-6549; (601) 982-7893 - home

If the Attorney General of the United States needs any further information concerning this submission, the State of Mississippi will attempt to supply it.

This the 26th day of December, 2001.

Respectfully submitted,

STATE OF MISSISSIPPI

BY: /s/ Mike Moore
MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI
Attorney and Chief Legal Officer
for the State of Mississippi

Heather P. Wagner
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APPENDIX Z

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JOHN ROBERT SMITH, SHIRLEY HALL,
and GENE WALKER,

Plaintiffs,

vs. No. 3:01cv855

ERIC CLARK, Secretary of State of
Mississippi; MIKE MOORE, Attorney General
of Mississippi; RONNIE MUSGROVE, Governor
of Mississippi; MISSISSIPPI REPUBLICAN
EXECUTIVE COMMITTEE; and MISSISSIPPI
DEMOCRATIC EXECUTIVE COMMITTEE,

Defendants,

and

BEATRICE BRANCH; RIMS BARBER;
L.C. DORSEY; DAVID RULE; JAMES
WOODARD; JOSEPH P. HUDSON; and
ROBERT NORVEL,

Intervenors.

(Filed Feb. 26, 2002)

NOTICE OF APPEAL

The intervenors, BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL, hereby notice

their appeal to the United States Supreme Court from the judgment and injunction issued by the three-judge court for the United States District Court for the Southern District of Mississippi on February 26, 2002. This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

/s/ Robert B. McDuff
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Counsel for Intervenors

Dated: February 26, 2002

[certificate omitted in printing]

APPENDIX AA

IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; MELVIN HORTON; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL — PLAINTIFFS

V. — NO. G-2001-1777 W/4

ERIC CLARK, Secretary of State of Mississippi; Mike Moore, Attorney General of Mississippi; Ronnie Musgrove, Governor of Mississippi — DEFENDANTS

(Filed Jan. 25, 2002)

NOTICE OF APPEAL

By this notice, Carolyn Mauldin, Stacy Spearman, David Mitchell, and James Clay Hays, Jr., and the Mississippi Republican Executive Committee appeal to the Supreme Court of Mississippi from the judgment entered in this cause on December 31, 2001, and from all interlocutory orders precedent thereto, as well as from the denial of their motion to vacate or amend judgment and for other relief, by order December 31, 2001.

This the 25th day of January, 2002.

Respectfully submitted,

CAROLYN MAULDIN, STACY SPEARMAN, DAVID MITCHELL, AND JAMES CLAY HAYS, JR.
By their attorneys

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MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE
By its attorneys
PHELPS DUNBAR LLP

BY: /s/ Michael B. Wallace
Michael B. Wallace
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[certificate omitted in printing]

(3)

Supreme Court, U.S.
FILED
APR 24 2002
OFFICE OF THE CLERK

No. 01-1437

IN THE

Supreme Court of the United States

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,

Appellants,

v.

JOHN ROBERT SMITH; SHIRLEY HALL; and GENE WALKER,

and

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

SUPPLEMENTAL BRIEF

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14pp

SUPPLEMENTAL BRIEF

The Federal District Court's injunction against the state court congressional redistricting plan was based on (1) the District Court's holding that preclearance under Section 5 of the Voting Rights Act had not been obtained, and (2) its additional holding that even if preclearance is obtained, the courts of Mississippi have no power to act in matters of congressional redistricting in light of Article I, § 4 of the United States Constitution. Consistent with Rule 18.10, this supplemental brief is submitted to inform the Court of events since the filing of the Jurisdictional Statement that bear on the preclearance question and provide additional support for our contention that the plan has been precleared.

As noted in the Jurisdictional Statement, the United States Department of Justice on February 14 requested more information regarding the Section 5 submission that included the state court plan. The District Court held that this request invalidated the original sixty day statutory review period. Even if that holding is correct, the review period was restarted on February 19 when the Mississippi Attorney General submitted the additional information. Subsequently, on April 22, 2002 — which was the first weekday after the sixtieth day after February 19 — the renewed sixty-day period expired without any objection by the United States Attorney General. Thus, even if the plan had not previously been precleared, it was precleared as of April 23.

Other than the February 14 request for more information, the only formal communication from the United States Department of Justice (DOJ) regarding the Section 5 submission came in a letter to the Mississippi Attorney General dated April 1, 2002. In that letter, the Chief of the Voting Section of the Civil Rights Division acknowledged that the additional information was received on February 19-20. However, the letter also stated that, in light of the District Court's Article I, § 4 holding, "it would be inappropriate for the

Attorney General to make a determination concerning [the] submission now." The letter said: "Where voting changes submitted by the State have been enjoined by a federal court, they are not presently capable of administration, and are not ripe for review by the Attorney General." The letters added that "[i]f the injunction against implementation of these changes is lifted, . . . the Attorney General will again consider these changes for preclearance." App. 9a.

On April 23, after the renewed sixty-day period expired, we filed in the District Court a motion to declare that the state court plan is now precleared under Section 5. That motion is reproduced in the appendix to this supplement. App. 1a. Attached to the motion was the April 1 letter, which also is reproduced here. App. 8a. (The February 19 submission of more information also was attached to the District Court motion. Because it was reproduced in the appendix to the jurisdictional statement, J.S. App. 200a, it is not included here).

In that motion, we contend that the District Court's Article I, § 4 holding does not postpone the statutory sixty-day review period. Section 5 provides that when any covered state "enact[s] or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it receives the requisite federal preclearance "if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . ." The State of Mississippi, through its courts, has "enact[ed] or seek[s] to administer"the state court redistricting plan. The District Court's holding to the effect that the Mississippi courts do not have that power as a matter of federal constitutional law

does not change the fact that the state courts have "enact[ed]" or "seek to administer" the state court plan. While the April 1 DOJ letter claims that the plan is not "capable of administration," Section 5's language does not require that it be capable of administration — but simply that the state authorities "enact or seek to administer" it. Given the absence of an objection within this second sixty-day period, the plan clearly has been precleared.

Once the District Court rules on this motion, we will inform this Court. Irrespective of the District Court's action, the injunction that it issued, based in part on Article I, § 4, will remain in place. Given that it is the injunction that is being appealed, no new notice of appeal will be necessary once the District Court rules. This appeal will remain. At the very least, this Court will be required to resolve the constitutional issue. Accordingly, this Court should go forward and note probable jurisdiction. To the extent the District Court's ruling affects the status of the Section 5 issue, the parties can brief the merits in light of whatever decision that court makes.

Respectfully Submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

JOHN ROBERT SMITH, SHIRLEY HALL, and GENE WALKER,
Plaintiffs,

vs. **No. 3:01cv855**

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,
Defendants,

and

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,
Intervenors.

INTERVENORS' MOTION TO DECLARE THAT THE STATE COURT PLAN IS NOW PRECLEARED UNDER SECTION 5 OF THE VOTING RIGHTS ACT

[filed April 23, 2002]

This Court's February 26 injunction against the state court congressional redistricting plan was based on (1) the holding that preclearance under Section 5 of the Voting Rights Act had

not been obtained, and (2) the additional holding that even if preclearance is obtained, the courts of Mississippi have no power to act in matters of congressional redistricting in light of Article I, § 4 of the United States Constitution. Because of intervening events, we contend that the plan has now unquestionably been precleared. Accordingly, we move this Court to declare that it is precleared. Although the injunction will remain in place in light of the constitutional holding, a holding that the plan has been precleared will narrow the issues in the pending appeal before the United States Supreme Court.

Section 5 provides that a redistricting plan is precleared if "the [United States] Attorney General has not interposed an objection within sixty days after [the] submission" of the plan. 42 U.S.C. § 1973c. A second sixty-day review period under Section 5 has now passed without an objection by the Attorney General. While the Department of Justice claimed in an April 1, 2002 letter that this Court's federal constitutional ruling renders the state court plan incapable of administration, and therefore "not ripe" for Section 5 review, the language of Section 5 does not allow for postponement of the sixty day period on that ground. Thus, the plan has been precleared.

This Court's February 26 order specifically retained jurisdiction of this case. Although the injunction has been appealed to the Supreme Court, this Court has the authority to resolve matters that arise in the interim. At present, the injunction is based both upon the constitutional ruling and the Section 5 ruling. We contend that intervening events require the Section 5 ruling to be vacated. This Court should promptly address the matter in the first instance. Although the Supreme Court appeal will remain in place irrespective of this Court's decision on the matter, that decision will affect the scope of the appeal. For example, if this Court declares the plan now

precleared, the Supreme Court likely will not need to address any of the additional Section 5 issues that presently are raised in the appeal.

In further support of this motion, the following is submitted:

On February 14, 2002, the United States Department of Justice requested more information regarding the State's December 26, 2001 submission under Section 5. The Mississippi Attorney General submitted that information on February 19, 2002. The United States Department of Justice contended that this request restarted the original sixty day statutory review period under Section 5 once the additional information was submitted. Over the intervenors' objection, this Court agreed. On February 26, 2002, with no decision having been made by the United States Attorney General under Section 5, this Court enjoined implementation of the state court congressional redistricting plan that had been included in the December 26 submission.

Even if this Court was correct that the February 14 request for more information invalidated the original sixty day statutory review period, the review period was restarted on February 19 when the Mississippi Attorney General submitted the additional information. That period expired on or before April 22, 2002, which was the first weekday after the sixtieth day after February 19. Under the terms of Section 5, the state court plan "may be enforced" if "the Attorney General has not interposed an objection within sixty days after [the] submission" of the plan. Because the Attorney General has not interposed an objection on or before April 22, the plan has been precleared.

Other than the February 14 request for more information,

the only formal communication from the United States Department of Justice to the Mississippi Attorney General regarding the Section 5 submission came on April 1, 2002. In a letter dated that day, the Chief of the Voting Section of the Civil Rights Division acknowledged that the additional information was received on February 19-20. However, the April 1 letter also stated that, in light of this Court's Article I, § 4 holding, "it would be inappropriate for the Attorney General to make a determination concerning [the] submission now." The letter said: "Where voting changes submitted by the State have been enjoined by a federal court, they are not presently capable of administration, and are not ripe for review by the Attorney General." The letters added that "[i]f the injunction against implementation of these changes is lifted, . . . the Attorney General will again consider these changes for preclearance." (A copy of the April 1 letter is attached as Exhibit 1. A copy of the February 19 submission of the additional information is attached as Exhibit 2).

However, this Court's Article I, § 4 holding does not postpone the statutory sixty-day review period. Section 5 provides that when any covered state "enact[s] or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it may obtain the requisite federal preclearance "if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . ." The State of Mississippi, through its courts, has "enact[ed] or seek[s] to administer"the state court redistricting plan. This is reflected in the Mississippi Supreme Court's December 13, 2001 ruling and the December 21

opinion and order of the Chancery Court of Hinds County. This Court's holding to the effect that the Mississippi courts do not have that power as a matter of federal constitutional law does not change the fact that the state courts have "enact[ed]" or "seek to administer" the state court plan.

Although the April 1 Department of Justice stated that the plan is not "presently capable of administration" because of this Court's constitutional injunction, Section 5 does not require that the plan be "capable of administration." It simply requires that the state authorities "enact or seek to administer" the plan. Once the plan is submitted, the statutory sixty day review period begins. Nothing in the statute allows the Attorney General to postpone the sixty day period simply because a federal court enjoins the plan on federal constitutional grounds.

In *Morris v. Gressette*, 432 U.S. 491 (1977), the Supreme Court noted that under Section 5, a covered jurisdiction may preclear a voting change by obtaining a declaratory judgment from the Federal District Court for the District of Columbia or, alternatively, "may submit [the] change . . . to the Attorney General and subsequently may enforce the change if 'the Attorney General has not interposed an objection within sixty days after such submission.'" *Id.* at 502. Under this alternative method, said the Court, "compliance with § 5 is measured solely by the absence, for whatever reason, of a timely objection on the part of the Attorney General." *Id.* The Court added:

> We think it clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. The congressional intent is plain: The extraordinary remedy of postponing the implementation of validly enacted state legislation was to

> come to an end when the Attorney General failed to interpose a timely objection based on a complete submission. Although there was to be no bar to subsequent constitutional challenges to the implemented legislation, there also was to be "no dragging out" of the extraordinary federal remedy beyond the period specified in the statute.

Id. at 504. Also, the Court pointed out that "the Attorney General's failure to object is not conclusive with respect to the constitutionality of the submitted state legislation." *Id.* at 505.

Thus, the Supreme Court recognized that federal courts might enjoin voting changes on constitutional grounds independent of any Section 5 review. At the same time, the Court said review by the Attorney General must provide an "expeditious" means of preclearance and may not be "'dragg[ed] out' . . . beyond the period specified in the statute." This strongly indicates that a constitutional injunction does not postpone the statutory sixty day review period.

The need for a prompt decision on a Section 5 submission, independent of any constitutional injunction, is illustrated by the fact that "States must often redistrict in the most exigent circumstances." *Growe v. Emison*, 507 U.S. 25, 35 (1993). If a federal court enjoins a redistricting plan on constitutional grounds, the injunction is subject to being vacated on appeal, perhaps through emergency review. However, if the United States Attorney General can postpone the sixty day period when an injunction is entered, the covered jurisdiction will be unable to implement the plan promptly even if the injunction is vacated. The jurisdiction will be required to await renewal and completion of the interrupted Section 5 review process. The language of Section 5 does not allow for this sort of delay.

Of course, if the Attorney General is unable — as we contend — to postpone the sixty period, there is the possibility that the completion of the Section 5 review process will have been in vain if the constitutional injunction is not lifted on appeal. But if Congress had believed this to be a problem, it would have written the statute to stop the sixty day period when such an injunction was issued. It did not do so, and the statutory terms of Section 5 do not allow for suspension of the review period on this basis.

In light of the foregoing, this motion should be granted.

Respectfully submitted,

/s/ Robert B. McDuff
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Counsel for Intervenors

APPENDIX B

U.S. Department of Justice

Civil Rights Division

JDR:RSB:TCH:RJD:nj
DJ 166-012-3
2001-4084

Voting Section
950 Pennsylvania Avenue, Room 7254
Washington, D.C. 20530

April 1, 2002

The Honorable Michael Moore
Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205-0220

Dear Mr. Attorney General:

This refers to the Orders dated December 21 and 31, 2001, of the Chancery Court of Hinds County in *Branch v. Clark* adopting a 2001 congressional redistricting plan and the Order dated December 13, 2001, of the Supreme Court of Mississippi in *In Re Mauldin*, authorizing the Chancery Court to adopt a congressional redistricting plan, for the State of Mississippi, submitted to the Attorney Gneral pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our February 14, 2002, request for additional information on February 19-20, 2002.

We understand that the federal court in *Smith v. Clark* (S.D. Miss.) has found the changes effected by the Orders in

Branch v. Clark, and *In Re Mauldin*, to be unconstitutional under Article I, Section 4 of the United States Constitution, and has enjoined their implementation on that basis. We further understand that applications for an emergency stay have been sought and denied by the United States Supreme Court, but that an appeal remains pending. Where voting changes submitted by the State have been enjoined by a federal court, they are not presently capable of administration, and are not ripe for review by the Attorney General. Accordingly, it would be inappropriate for the Attorney General to make a determination concerning your submission now. *See Procedures for the Administration of Section 5* (28 C.F.R. 51.22(a), 51.35). If the injunction against implementation of these changes is lifted, upon notification, the Attorney General will again consider these changes for preclearance unless the state notifies us of its intent to alter them. Any documentation previously provided need not be resubmitted. Refer to File No. 2001-4084 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

/s/ Joseph D. Rich
Joseph D. Rich
Chief, Voting Section

No. 01-1437

Supreme Court, U.S.
FILED
APR 29 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY;
DAVID RULE; JAMES WOODARD;
JOSEPH P. HUDSON; and ROBERT NORVEL,

Appellants,

v.

JOHN ROBERT SMITH; SHIRLEY HALL;
and GENE WALKER,
and
ERIC CLARK, Secretary of State of Mississippi;
MIKE MOORE, Attorney General of Mississippi;
RONNIE MUSGROVE, Governor of Mississippi;
MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and
MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Where the law of a state covered by § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, has previously provided that its courts may not entertain challenges to the manner of election of Members of the United States House of Representatives, must an order by its Supreme Court authorizing a trial court to impose a redistricting plan be reviewed and approved under § 5; and, if so, may the plan imposed by the trial court be reviewed under § 5 before the Supreme Court order granting jurisdiction has been approved?

2. Does Article I, § 4 of the United States Constitution permit a state court, in adjudicating a claim brought only under state law, to order its own congressional redistricting plan into effect when that State's Legislature has directed by statute that election of Representatives be conducted at large?

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MOTION TO AFFIRM

Pursuant to this Court's Rule 18.6, John Robert Smith, Shirley Hall, and Gene Walker, who were plaintiffs before the United States District Court for the Southern District of Mississippi, and the Mississippi Republican Executive Committee, one of the defendants, move to affirm the judgment of that Court. The District Court ruled that a congressional redistricting plan prepared by appellants, who were plaintiffs in a separate action before the Chancery Court of the First Judicial District of Hinds County, Mississippi, could not be enforced consistent with § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. As a separate ground for its judgment, the District Court ruled that the Chancery Court's imposition of a congressional redistricting plan was barred by Art. I, § 4 of the United States Constitution, which confers upon legislatures the power to regulate elections to the House of Representatives. If either the statutory or the constitutional ruling is correct, the judgment of the District Court must be affirmed. Both rulings are correct.

JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1253.

REGULATIONS

In addition to the statutes and constitutional provisions identified in the Jurisdictional Statement, the following regulations adopted by the Attorney General of the United States are implicated in this appeal.

28 C.F.R. § 51.15 provides in pertinent part:

> (a) With respect to legislation (1) that enables or permits the State or its political subunits to institute a voting change or (2) that requires or enables the State or its political sub-

units to institute a voting change upon some future event or if they satisfy certain criteria, the failure of the Attorney General to interpose an objection does not exempt from the preclearance requirement the implementation of the particular voting change that is enabled, permitted, or required, unless that implementation is explicitly included and described in the submission of such parent legislation.

(b) For example, such legislation includes –

(1) Legislation authorizing counties, cities, school districts, or agencies or officials of the State to institute any of the changes described in § 51.13.

28 C.F.R. § 51.22 provides in pertinent part:

The Attorney General will not consider on the merits:

. . .

(b) Any proposed change which has a direct bearing on another change affecting voting which has not received section 5 preclearance.

28 C.F.R. § 51.35 provides in pertinent part:

The Attorney General will make no response on the merits with respect to an inappropriate submission but will notify the submitting authority of the inappropriateness of the submission. Such notification will be made as promptly as possible and no later than the 60th day following receipt and will include an explanation of the inappropriateness of the submission. Inappropriate submissions include . . . premature submissions (see §§ 51.22, 51.61(b)). . . .

STATEMENT OF THE CASE

Appellants' Statement of the Case is substantially correct. As might be expected, however, in a dispute litigated simultaneously in multiple courts, a few clarifications are necessary.

Appellants were plaintiffs in the Chancery Court and intervened as defendants in the District Court. Process was served in both cases in November of 2001, although the Chancery Court complaint was filed a few weeks earlier. Neither the complaint nor the amended complaint in Chancery Court raised any claim under federal law. The very first sentence of each pleading declared, "This action for injunctive relief is brought to insure compliance with Mississippi law . . . . " Mtn. App. 1.

Appellants sued only the three elected state officers, all Democrats, who are members of the State Board of Election Commissioners. Although the executive committees of the political parties are responsible for enforcement of the statutes governing nominations to Congress by primary or petition, appellants sought to litigate their claim in their absence. At the request of Attorney General Mike Moore, one of the defendants, the Chancery Court ordered the executive committees added as defendants, and a summons was served on the Mississippi Republican Executive Committee. Although the Chancery Court later vacated its order, the Committee appeared, moved to dismiss, and moved to vacate the order revoking its joinder in the action. Although the Committee did not file a separate motion to intervene, four voters intervened as defendants. Having been served with process, the Committee joined the intervening defendants in their appeal to the Supreme Court of Mississippi.[1]

---

[1] Appellants complain that neither the Committee nor the intervening defendants asked the Supreme Court of Mississippi to stay the judgment of the Chancery Court. J.S. 6. No such motion would have been appropriate, because that judgment is automatically stayed pending compliance with § 5 of the Voting Rights Act. Appellants, who are appellees in the appeal to the Supreme Court of Mississippi, have never asked that Court to expedite its consideration of the appeal.

The congressional redistricting plan imposed by the Chancery Court's judgment, which appellants repeatedly describe as the state court plan, was devised and submitted into evidence by appellants themselves. App. 121a. The Chancery Court's opinion and order of December 21, 2001, describes it as "Branch Plaintiffs' Plan 2A Zero Deviation." App. 134a. Refusing to permit enforcement of appellants' plan, the District Court described it as "having been drafted by the Intervenors (plaintiffs in Chancery Court), not by the Chancery Court, and not by the Mississippi Legislature." App. 31a-32a.

Appellants' contention that "[n]o party in the federal case asserted that the particular lines in the state court plan violated . . . the Voting Rights Act," J.S. 6, is an exercise in semantics. Plaintiffs alleged and the District Court agreed that all lines in appellants' plan violated the Voting Rights Act because they had never been approved under § 5. Moreover, plaintiffs contended that the Chancery Court's decision to impose any system of districts violated the Voting Rights Act because of its inconsistency with Miss. Code Ann. § 23-15-1039 (Rev. 2001), which had been approved by the Attorney General of the United States pursuant to § 5 and which required Representatives to be elected at large. No change in Mississippi law challenged by plaintiffs in the District Court has yet been approved under § 5.

Plaintiffs asked the District Court to order the elections of Representatives at large under 2 U.S.C. § 2a(c)(5), which, like § 23-15-1039, requires at-large elections when the size of the delegation has been reduced but no redistricting has been completed. The District Court did not explain its failure to enforce these identical state and federal statutes. Because plaintiffs are satisfied with the remedy imposed by the District Court's judgment, they ask this Court to affirm that judgment. However, should

the Court choose to set this appeal for argument, plaintiffs ask this Court to review the District Court's failure to order at-large elections, as set forth in their separate Jurisdictional Statement on their conditional cross-appeal, as permitted by this Court's Rule 18.4.

ARGUMENT

I. BECAUSE NO MISSISSIPPI CONGRESSIONAL DISTRICTING PLAN HAS BECOME LAW, THE DISTRICT COURT PROPERLY IMPOSED A PLAN.

Appellants offer no criticism of the redistricting plan adopted by the District Court. They make no contention that the District Court ignored constitutional requirements or the remedial principles announced by this Court's precedents. Rather, they claim only that there was no wrong to remedy, because a new redistricting plan for Mississippi had already taken effect. They assert that their plan was properly submitted by General Moore after its approval by the Chancery Court and that, because of deficiencies in the letter of February 14, 2002, from the Chief of the Voting Rights Section of the Department of Justice, "the state court plan has been precleared." J.S. 21. Because, as will be seen, appellants' plan has not been precleared, the District Court's judgment imposing its own plan must be affirmed.[2]

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[2] The statutory issue is addressed first because of its sufficiency to support the judgment. Ordinarily, if an appeal may be resolved on statutory grounds, this Court will not reach any constitutional questions. *See, e.g., Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 343-44 (1999), citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

A. The District Court properly ruled that all three submitted changes required approval under § 5 of the Voting Rights Act.

General Moore's letter of December 26, 2001, to the Department of Justice submitted three changes for preclearance under § 5 of the Voting Rights Act: (1) appellants' redistricting plan, as embodied in the Chancery Court's order of December 21, 2001; (2) the reassignment of jurisdiction over redistricting to the Chancery Court by the Supreme Court's order of December 13, 2001, in *In re Mauldin* No. 2001-M-01981 (Miss. Dec. 13, 2001), App. 110a; and (3) the judicial imposition of a redistricting plan to the extent that it departed from the at-large requirement of Miss. Code Ann. § 23-15-1039. App. 227a-229a. Appellants admit that their redistricting plan required preclearance under § 5, but they deny that the other two submissions needed preclearance. In fact, all three changes are subject to § 5. Because *In re Mauldin* had not been precleared, the Department of Justice and the District Court properly concluded that consideration of appellants' redistricting plan itself was premature.

1. The order in *In re Mauldin* is enabling legislation under 28 C.F.R. § 51.15(b)(1).

The indispensable key to appellants' statutory argument is that the Supreme Court's order in *In re Mauldin* is not a voting change which requires approval under § 5 of the Voting Rights Act. Both the District Court and the Department of Justice found to the contrary. The District Court stated that *In re Mauldin* "clearly appears to be a change in Mississippi's election procedures that must be precleared by federal authorities." App. 97a. *See also* App. 33a. The letter to General Moore from the Chief of the Department's Voting Section described the order "that granted the Chancery Court of Hinds County jurisdiction to adopt and direct the implementation of a congressional

redistricting plan" as a "change in voting procedure." App. 193a. Appellants bewail at some length the supposedly dire consequences of that finding, but they offer no analysis of the statute or its implementing regulations which would undermine the conclusion reached by the District Court and the Department.

The broad reach of § 5 is well known. This Court has repeatedly stated that "Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969). The Attorney General has confirmed this broad scope in the regulations implementing the statute:

> Any change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the section 5 preclearance requirement.

28 C.F.R. § 51.12. The regulations explicitly list redistricting decisions as being among those requiring preclearance. 28 C.F.R. § 51.13(e).

Deciding who shall have authority to make redistricting decisions may be one step removed from the redistricting itself, but it still falls within the scope of § 5. The regulations describe "enabling legislation" to include any provision "that enables or permits the State or its political subunits to institute a voting change." 28 C.F.R. § 51.15(a). Specific examples of such enabling legislation include:

> (1) Legislation authorizing counties, cities, school districts, or agencies or officials of the State to institute any of the changes described in § 51.13.

28 C.F.R. § 51.15(b)(1). *In re Mauldin* falls squarely within this definition.[3] The judges of Mississippi's Chancery Courts are "officials of the State," and *In re Mauldin* authorizes them "to institute [one] of the changes described in § 51.13," the preparation and imposition of redistricting plans. This Court has expressly approved the authority of the Attorney General to promulgate regulations implementing § 5, *Georgia v. United States*, 411 U.S. 526, 536 (1973), and it has traditionally given great deference to his application of the Act. Because this Court could agree with the Attorney General that a city's annexation of a vacant lot requires approval under § 5, *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987), it should have no difficulty in agreeing here with the District Court and the Justice Department that the reassignment of redistricting authority to the Chancery Court constitutes a change affecting voting.

Pursuant to its regulations, the Department of Justice has consistently acknowledged that a transfer of redistricting authority is subject to § 5. In a document available for public review on the Internet, the Department continues to declare:

> Some transfers of authority between government officials . . . clearly have a direct relationship to voting if they concern authority over voting procedures, such as a change in who has authority to adopt a redistricting plan, conduct voter registration, or select polling place officials. *See, e.g., Foreman v. Dallas County*, 521 U.S. 979 (1997).

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[3] Although judicial orders would not generally be characterized as "legislation," all parties agree that voting changes are subject to § 5 even when ordered by courts, rather than by legislative authorities. *Hathorn v. Lovorn*, 457 U.S. 255 (1982).

Department of Justice, *About Section 5 of the Voting Rights Act*, "Section 5 Requirements," <http://www.usdoj.gov/crt/voting/sec_5/types.htm>. Although *Foreman* did not involve redistricting, it illustrates the importance of federal review of a change in decisonmakers. By using "party-affiliation formulas of one sort or another," Dallas County had changed its procedures for selecting election judges, "who supervised voting at the polls on election days." 521 U.S. at 980. Obviously, each election judge exercises a substantial amount of discretion in making decisions on election days; § 5 requires federal review of the procedures for selecting those judges so as to minimize the likelihood that they will exercise their discretion in a discriminatory fashion. So, too, state officials exercise a tremendous amount of discretion in adopting redistricting plans; it is equally important for federal officials to consider whether individual judges are more likely than the Mississippi Legislature to exercise that discretion in a discriminatory fashion.

The principle embodied in 28 C.F.R. § 51.15(b)(1) is fully consistent with this Court's decision in *Presley v. Etowah County Comm'n*; 502 U.S. 491 (1992). There, this Court held, "Changes which affect only the distribution of power among officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting." *Id.*, at 506. The Court, however, continued:

> To be sure, reasonable minds may differ as to whether some particular changes in the law of a covered jurisdiction should be classified as changes in rules governing voting. . . . When the Attorney General makes a reasonable argument that a contested change should be classified as a change in a rule governing voting, we can defer to that judgment.

Id., at 509. As indicated from his public pronouncements and from the February 14 letter to General Moore, the

Attorney General continues to believe that a reassignment of redistricting authority "should be classified as a change in a rule governing voting." *Id.* While not binding, his judgment is one to which this Court may reasonably defer, as it did in *Foreman*.[4] *See also United States v. Louisiana*, 952 F.Supp. 1151, 1165-68 (W.D. La.) (*Presley* does not foreclose Attorney General's determination that a city court is a subunit of a city under 28 C.F.R. § 51.13(e)), *aff'd mem.*, 521 U.S. 1101 (1997).

Deference to the Attorney General's judgment is unlikely to have the broad effects predicted by appellants. Many state courts have litigated voting rights claims of various descriptions over the last four decades, but most such claims have arisen under federal law, not state law. State courts derive their authority and duty to litigate federal claims, not from legislative enactment or judicial decision, but from Article VI of the Constitution. Appellants here did not assert a federal claim; they took pains to clarify that their complaint before the Chancery Court asserted only claims arising under state law. The reassignment of authority to make redistricting determinations applying state law alone constitutes enabling

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[4] The dissent in *Presley* identified several transfers of authority which had been found subject to § 5, including "a transfer of voter registration duties from the county clerk to the county tax assessor." *Id.*, at 512 n.3 (Stevens, J., dissenting), quoting Brief for United States as *Amicus Curiae* 16 n.6. Likewise, in *County Council of Sumter County v. United States*, 555 F.Supp. 694 (D.D.C. 1983), the Attorney General had approved a South Carolina statute transferring the bulk of local decisionmaking authority, including the authority to select a form of government and to establish election districts, from the state to the county. The three-judge court unanimously agreed that "the shift of power from the Governor and the General Assembly to the new County Council" constituted a change affecting voting. *Id.*, at 702. This Court's opinion in *Presley* did not repudiate either of these precedents.

legislation under 28 C.F.R. § 51.15 just as much as the reassignment of authority to register voters or to supervise the polls. Here, neither the District Court nor the Department of Justice decided that a state court must obtain preclearance under § 5 before adjudicating a federal claim. The much narrower principle actually established by this case will control only claims in state court arising under state law.

Because *In re Mauldin* falls within the plain language of 28 C.F.R. § 51.15(b)(1), and because appellants have shown no reason to disregard the determination of the District Court and the Department of Justice, this Court should conclude that preclearance of the decision of the Supreme Court of Mississippi is required under § 5.

2. The Chancery Court's unexplained disregard of the at-large election requirement of Miss. Code Ann. § 23-15-1039 is a voting change.

The Mississippi Legislature, in a provision readopted most recently in 1986, 1986 Miss. Gen. Laws ch. 495 § 308, has provided a rule for conducting elections whenever it fails to adopt a redistricting plan after a change in the size of the delegation. The applicable language provides that, "if the number of representatives shall be diminished, then the whole number shall be chosen by the electors of the state at large." Miss. Code Ann. § 23-15-1039. In ordering its own redistricting plan into place, the Chancery Court simply ignored this statute. It did not find the at-large mandate to be unconstitutional or inapplicable; it simply failed to address it at all.

The District Court, by contrast, held that the Chancery Court's disregard of § 23-15-1039 constituted a change from prior Mississippi law. The Court unequivocally stated that "the Chancery Court's judgment adopting a congressional redistricting plan is a change . . . from

the at-large plan set forth in Miss. Code Ann. § 23-15-1039 for circumstances such as the present ones." App. 98a. In its letter to General Moore of February 14, the Department of Justice made no such explicit finding, but its questions implicitly recognized that a change had been made. With regard to the reassignment of redistricting power to the Chancery Courts, the letter requested, "Please explain the State's view of the relationship between this change in voting procedure and Miss. Code Annot. 23-15-1039." App. 193a-194a.

Appellants' contention that the District Court and the Justice Department misunderstood the statute is purest sophistry. Noting the statute's application to elections held "before the districts shall have been changed to conform to the new apportionment," appellants contend that the districts changed "[o]nce the state court adopted a plan," J.S. 26, thus removing the precondition for the application of the statute. Of course, changes in Mississippi districts "are not now and will not be effective as laws until and unless cleared pursuant to § 5." *Connor v. Waller*, 421 U.S. 656 (1975). Had the Chancery Court accepted appellants' construction of § 23-15-1039, it would have instructed state officials to conduct at-large elections until such time as a redistricting plan had been properly approved.

The District Court construed § 23-15-1039 according to its plain meaning and found that the enforcement of appellants' plan would constitute a change from that meaning. Appellants offer no good reason for this Court to reject the District Court's common-sense reading of the statute. For this Court to accept appellants' fanciful construction of the statute would violate its ordinary procedures. "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be

unreasonable." *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 224 n.10 (1985), quoting *Propper v. Clark*, 337 U.S. 472, 486-87 (1949), and citing cases. *Accord, Stenberg v. Carhart*, 530 U.S. 914, 940 (2000). Although the District Court's judgment has not had the benefit of review by the Court of Appeals, it is noteworthy that all three judges accepted this reading of Mississippi law.

Finally, it beggars belief to suppose that the Mississippi Legislature intended § 23-15-1039 to apply only when a court had failed to redistrict the state. The statute in its present form goes back at least as far as the first code following the adoption of Mississippi's present Constitution of 1890. 1892 Miss. Code § 3690. At that time there was no precedent whatsoever for the drawing of congressional districts by a court. Mississippi's rejection of such a practice was confirmed in *Brumfield v. Brock*, 169 Miss. 784, 142 So. 745 (1932), which remained good law until *In re Mauldin*. Thus, the historical record squarely precludes appellants' reading of the statute.

For these reasons, the District Court properly concluded that enforcement of appellants' redistricting plan would constitute a change from the law prescribed by § 23-15-1039.

B. The District Court properly agreed with the Department of Justice that consideration of appellants' congressional redistricting plan was inappropriate under 28 C.F.R. § 51.35.

The Attorney General is obliged under § 5 of the Voting Rights Act to consider changes in election law properly submitted by state authorities. All parties recognize that the Attorney General's power to prescribe reasonable regulations to govern that process was confirmed by this Court in *Georgia v. United States, supra*. Appellants nevertheless contend that the application of those regulations by the Department of Justice in this case was so

arbitrary and unnecessary that their congressional redistricting plan became effective 60 days after General Moore submitted it. Appellants are wrong.

The regulations quite reasonably describe the sorts of changes which may be submitted for consideration, as well as the time of proper submission. In 28 C.F.R. § 51.35, the regulations provide for the disposition of improper submissions. The Department's letter of February 14 invoked this provision in refusing to consider appellants' redistricting plan:

> Because the December 13, 2001 Order of the Mississippi Supreme Court (In re Mauldin No. 2001-M-01891), and the December 21 & 31, 2001 Orders of the Chancery Court which adopted a redistricting plan, are directly related, it would be inappropriate for the Attorney General to make a determination concerning the congressional redistricting plan adopted by the Chancery Court. See 28 C.F.R. 51.22(b); 51.35.

App. 192a. The former provision mentioned in the letter concerns premature submissions, which it defines to include "[a]ny proposed change which has a direct bearing on another change affecting voting which has not received section 5 preclearance." 28 C.F.R. § 51.22(b). In other words, because the Chancery Court's authority to impose a redistricting plan had not yet received preclearance under § 5, it was premature for the state to submit for consideration appellants' plan which the Chancery Court had adopted.

There is nothing arbitrary or improper about the Department's application of its regulations in this case. The District Court approved the Department's finding that it could not "make a determination considering the Chancery Court plan until it receives the requested information and makes a decision on whether to approve the assignment of jurisdiction to the Chancery Court." App. 33a n.3. Until the Attorney General approves the Chancery Court's assumption of jurisdiction, the Chancery Court's approval of appellants' plan carries no more weight than the approval by appellants themselves.

In attacking the Department's February 14 request for information regarding the effect of *In re Mauldin*, appellants fail to carry the heavy burden of showing that the Department has engaged in "unwarranted administrative conduct," as described in *Georgia v. United States*, 411 U.S. at 541 n.13. Indeed, they do nothing more than restate their earlier objections that *In re Mauldin* should not be considered a change in the first place. If reassignment of electoral authority among state officials can ever be subject to § 5, as *Foreman* holds, then it can hardly be frivolous for the Department to investigate the possible consequences of that reassignment.

Appellants' argument is based upon their misreading of *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000). That case does not hold that all submissions must be approved where no retrogression, actual or intended, is shown; the holding is limited to "§ 5 in its application to vote-dilution claims." *Id.*, at 328. Retrogression is the touchstone for evaluating appellants' redistricting plan, but it is not the sole consideration in reviewing the reassignment of redistricting authority effected by *In re Mauldin*.

As noted above, reassignments of electoral authority are important because election officials exercise discretion. Appellants are certainly correct that retrogression can be forestalled by § 5 review of the redistricting plan itself. However, in any redistricting process, there are many potential plans which do not constitute retrogression. The selection among those plans is an exercise of discretion, and that discretion can be exercised in a discriminatory fashion. Where redistricting authority is reassigned, § 5 review is necessary to assure that the

reassignment does not make discrimination more likely in the exercise of that discretion. All of the Department's questions in its February 14 letter are plainly directed toward that end.

Finally, even if this Court were to accept appellants' contention that the February 14 letter was insufficient to toll the running of the 60-day period, the only effect would be the approval of *In re Mauldin*. The time for consideration of appellants' redistricting plan itself was not tolled; it never started. The Department's declaration, approved by the District Court, was that the submission of the plan was premature under § 51.22(b) until *In re Mauldin* had been approved. If appellants are correct that *In re Mauldin* has now been approved by operation of law, then the consideration of their redistricting plan may begin. The District Court was plainly correct in concluding, App. 33a-34a & n.3, that the plan had not gone into effect.

Because no congressional redistricting plan for Mississippi had gone into effect, the District Court had no choice but to impose its own plan. Because appellants have not identified any defect in the District Court's plan,[5] its judgment must be affirmed.

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[5] In their Jurisdictional Statement on their conditional cross-appeal, plaintiffs and the Committee have argued that the District Court erred by failing to impose the at-large election required by 2 U.S.C. § 2a(c)(5). Should this Court grant the motion to affirm, there will be no need to address the issue raised by the conditional cross-appeal.

II. ARTICLE I, SECTION 4 OF THE CONSTITUTION DELEGATES POWER OVER CONGRESSIONAL ELECTIONS TO A STATE'S LEGISLATIVE AUTHORITIES, NOT ITS JUDICIAL AUTHORITIES.

Even if appellants were correct that their redistricting plan has been precleared under § 5, it would remain unenforceable because of its adoption by the Chancery Court. Article I, § 4 of the Constitution of the United States declares in pertinent part:

> The Times, Places, and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .

The District Court properly found that the Mississippi Legislature had not authorized the Chancery Court to devise new congressional districts, and it therefore properly enjoined the enforcement of the Chancery Court's judgment. App. 7a.

A. The Framers intended power to be exercised by legislative authorities subject to federal control, not control by other state authorities.

The constitutional delegation of power to make redistricting decisions seems quite clear on its face. In *Federalist No. 59*, Alexander Hamilton explained the necessity and propriety of legislative regulation of congressional elections:

> [I]t will therefore not be denied, that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature,

> or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention.

It would have astounded the Framers to suppose that the state courts should have "a discretionary power over elections" to Congress, such as that exercised by the Chancery Court here.

The Framers delegated this authority not to the states, to be exercised as the states might choose, but quite specifically to state legislatures. Other provisions of the Constitution show that the Framers knew how to specify the state authorities to exercise particular powers. Besides authority over elections to Congress, seven other powers were given to the state legislatures: to appoint Senators (Art. I, § 3); to consent to land purchases by Congress (Art. I, § 8); to provide the manner for appointing presidential electors (Art. II, § 1); to consent to subdivision of a state (Art. IV, § 3); to seek national help during a domestic disturbance (Art. IV, § 4); to apply for a constitutional convention (Art. V); and to ratify amendments if Congress chooses that method (Art. V). Two of these – the power to fill Senatorial vacancies in Art. I, § 3 and to seek emergency national help in Art. IV, § 4 – explicitly provide for state *executive* gap filling. No discretionary power whatsoever is delegated to the state courts. State courts are obliged by the Supremacy Clause of Art. VI to enforce federal law, but appellants asserted no federal claim in their complaint in Chancery Court.

The Framers were quite conscious that state legislatures might be unable or unwilling to discharge the powers delegated to them by the Constitution. Hamilton in *Federalist No. 59* expressed particular concern that they might fail to provide for elections to Congress:

> Nothing can be more evident, than that an exclusive power of regulating elections for the

> national government, in the hands of the State legislatures, would leave the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs.

Although the Framers could have assigned the power to cure legislative defaults to other state authorities, as they had in Art. I, § 3 and Art. IV, § 4, they chose instead to place that responsibility in federal hands. Charles Cotesworth Pinckney explained to the South Carolina Legislature that this decision stemmed from the fear that local political disputes would cripple the national interest:

> [I]t is absolutely necessary that Congress should have this superintending power; lest, by intrigues of a ruling faction in the state, the members of the House of Representatives should not really represent the people of the state, and lest the same faction, through partial state views, should altogether refuse to send representatives to the general government.

4 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* 303 (2d ed. 1888).

The few judicial decisions to consider Art. I, § 4 have construed the term "legislature" broadly enough to include all of a state's legislative authorities, but not so broadly as to include the state courts. In *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), this Court gave effect to a referendum conducted pursuant to Ohio law to invalidate a redistricting plan passed by its Legislature. This Court held that Art. I, § 4 did not preclude Congress from providing by statute that redistricting should be accomplished in the manner provided by state law. *Id.*, at 569-70. The Supreme Court of Ohio had construed its law to the effect that "the provisions as to referendum were a

part of the legislative power of the state," *id.*, at 567,[6] thus complying with the controlling congressional statute.

In *Smiley v. Holm*, 285 U.S. 355 (1932), plaintiffs argued that the Constitution precluded the Governor of Minnesota from vetoing a redistricting plan adopted by that state's Legislature. This Court carefully examined history to determine that the Framers would have regarded the veto as a legitimate part of the legislative process to which the Constitution had delegated authority:

> At the time of the adoption of the Federal Constitution, it appears that only two states had provided for a veto upon the passage of legislative bills; Massachusetts, through the Governor, and New York, through a council of revision. But the restriction which existed in the case of these states was well known. That the state Legislature might be subject to such a limitation, either then or thereafter imposed as the several states might think wise, was no more incongruous with the grant of legislative authority to regulate congressional elections than the fact that the Congress in making its regulations under the same provision would be subject to the veto power of the President, as provided in article 1, § 7.

Id., at 368-69.

Davis and *Smiley* stand at most for the proposition that the electorate, exercising the referendum power, and the governor, exercising the veto power, may be considered to be among the state legislative authorities to whom

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[6] Mississippi, by contrast, provides that "[t]he legislative power of the state shall be vested in a legislature." Miss. Const. Art. 4, § 33 (1890). As the District Court observed, App. 11a n.6, the courts are explicitly forbidden to exercise legislative power by Art. 1, § 2.

redistricting power was delegated by Art. I, § 4. However, by no means do those cases support the proposition that, when the Legislature fails to act, other state officials may exercise the "discretionary power over elections" to which Hamilton referred. In both *Davis* and *Smiley* the Legislature had actually adopted a plan, but other state legislative authorities prevented it from becoming law. The result in both cases was the continued enforcement of the existing districting plan, not the adoption of a new and different plan by other state authorities.

A more recent case suggests that other state officials have no role to play when the Legislature has failed to adopt an enforceable congressional redistricting plan. In *Grills v. Branigin*, 284 F.Supp. 176 (S.D. Ind.), *aff'd mem.*, 391 U.S. 364 (1968), plaintiffs successfully sued members of the Election Board to enjoin enforcement of an unconstitutional districting scheme. When the Indiana Legislature failed to pass a new scheme, the defendants asked the Court to authorize the executive branch defendants to draw the plan. The Court refused: "Article I, Section 4, Clause 1 of the United States Constitution clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts." 284 F.Supp. at 180.

To permit other state officials affirmatively to substitute their discretion for that of the Legislature in redistricting matters might realize Pinckney's fear that the "intrigues of a ruling faction in a state" could produce a congressional election which "should not really represent the people of the state." Here, the leaders of the Mississippi Legislature declined to reach a political compromise, but continued their intrigues in their testimony before the Chancery Court. A federal rule which permits other state officials to resolve political quarrels in place of the Legislature decreases the likelihood that the Legislature will discharge the duties delegated to it by Art. I, § 4,

and increases the likelihood that legislators may choose instead to seek political results from selected state judges.

This appeal does not present the question of whether a state court may impose a redistricting plan as a remedy for a violation of federal law, because appellants asserted no federal claim before the Chancery Court. Even if Art. I, § 4 permits a state court to impose a redistricting plan in resolving a federal claim, it remains important to exclude redistricting claims brought under state law. A federal claim brought in state court may be reviewed by this Court for errors of federal law; here, the Chancery Court's declaration that "fairness to the incumbents is a paramount consideration," App. 131a, would be promptly corrected. *See Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts."). By contrast, this Court would not be able to review an exercise of discretion under state law, except to assure compliance with minimal standards set by the federal Constitution and statutes. As they did in the District Court, *see* App. 30a-34a, appellants would defend all exercises of the Chancery Court's discretion as determinations of state policy to which this Court must defer.

This very practical consideration forecloses appellants' reliance on *Wesberry v. Sanders*, 376 U.S. 1 (1964). There, this Court held that the assignment of authority to Congress in Art. I, § 4 did not preclude the federal courts from enforcing the separate demands of Art. I, § 2 for equal representation. The Framers surely would have understood that any litigation to enforce Art. I, § 2 would be fully reviewable by this Court; even if Art. VI permits state courts to entertain such federal claims, this Court retains the final authority. Thus, the fact that federal claims may be litigated notwithstanding Art. I, § 4 does

not compel the conclusion that state claims, unreviewable in this Court, must be similarly permissible. Certainly, Framers like Pinckney, who feared "intrigues of a ruling faction in a state," would have been unwilling to surrender unreviewable authority to state judges.

The language, history, and prior application of Art. I, § 4 necessitate the conclusion that state courts may not impose congressional redistricting plans in adjudicating a claim brought under state law.

B. The District Court's ruling does not contravene *Growe v. Emison*.

Relying on *Growe v. Emison*, 507 U.S. 25 (1993), appellants contend that affirmance of the District Court's judgment would preclude most state courts from litigating congressional redistricting claims when legislatures fail to complete the redistricting process.[7] Whether state courts should have such power is certainly questionable, notwithstanding the result in *Growe*, because of the plain language of Art. I, § 4. However, no such dilemma is presented by the District Court's judgment, because it is consistent with the result in *Growe* for two separate reasons. First, the Minnesota court, unlike the Chancery Court here, adjudicated a federal claim as required by the Supremacy Clause of Art. VI; other state courts will remain free to do the same. Second, the Chancery Court

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[7] As the District Court found, App. 18a, the constitutional issue raised by plaintiffs and the Committee has not been foreclosed by *Growe*. The issue of whether a state court's resolution of a redistricting dispute is consistent with Art. I, § 4 was not raised or decided in that case. As the Court has recently said, "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001). *Accord, Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). The issue facing this Court is therefore of one of first impression.

here acted in defiance of the legislative will as expressed in Miss. Code Ann. § 23-15-1039; the District Court's opinion left open the possibility that other legislatures might delegate redistricting authority to their courts.

1. The Minnesota court derived its power, not from Article I, section 4, but from its duty under Article VI to enforce Article I, section 2, but no federal claim was presented here to the Chancery Court.

The complaint filed by appellants in Chancery Court is certainly unusual and probably unique. Unlike most redistricting cases, it asserts no claim under federal law. Instead, ¶ 5 of the amended complaint invokes "the interests of the plaintiffs and all Mississippi voters in enforcement of Mississippi's election laws," as well as "their rights under Mississippi law to participate in a congressional election process conducted in a timely manner." Mtn. App. 3.

Appellants' assertion that "the state courts were required to enforce both federal and state law," J.S. 17 n.7, obscures the true record. The first time they mentioned a federal statute in the Chancery Court proceedings, appellants went out of their way to make clear that their claim arose only under state law, presumably to avoid the possibility of removal to federal court. In the process of arguing that enforcement of Mississippi's at-large statute would violate 2 U.S.C. § 2c, appellants added:

> As previously mentioned, our claim in this case is brought specifically under Mississippi law and seeks to enforce Mississippi law. In response, the intervenors have claimed that § 23-15-1039 requires at-large elections. We raise federal law at this juncture only to show that even if this at-large option were required by that statute, it is not a viable solution because it violates both federal law and the Mississippi Constitution.

Mtn. App. 8 n.3. It is simply beyond dispute that appellants sought relief from the Chancery Court only under Mississippi law, to the exclusion of federal law.

The Minnesota pleadings in *Growe* were entirely different:

> In January 1991, a group of Minnesota voters filed a state-court action against the Minnesota Secretary of State and other officials responsible for administering elections, claiming that the State's congressional and legislative districts were malapportioned, in violation of the Fourteenth Amendment of the Federal Constitution and Article 4, § 2, of the Minnesota Constitution.

507 U.S. at 27. It is certainly the case that the Supremacy Clause of Art. VI ordinarily obligates state courts to entertain claims for enforcement of federal law. For instance, this Court has held that state courts must hear claims arising under the Voting Rights Act. *Hathorn, supra*, 457 U.S. at 269-70. Neither *Growe* nor any other case directly considers the question of whether state courts may or must hear federal claims concerning congressional redistricting.[8]

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[8] Appellants contend that the District Court's judgment is inconsistent with that of numerous state courts which have entered congressional redistricting orders since the completion of the 2000 census. J.S. 14. Most of the opinions to which appellants refer indicate only that plaintiffs presented constitutional claims, without specifying whether they arose under state or federal law. *Beauprez v. Avalos*, 42 P.3d 642, 645 (Colo. 2002); *Zachman v. Kiffmeyer*, 629 N.W.2d 98 (Minn. 2001); *Perry v. Del Rio*, 67 S.W.3d 85, 87 (Tex. 2001). In Oregon, however, the trial court explicitly stated that "the plaintiffs challenge the constitutionality of the existing United States

Appellants suggest that *Growe* holds the precise nature of the claim to be irrelevant to a state court's authority to adjudicate congressional redistricting claims. However, when this Court in *Growe* stated that *Scott v. Germano*, 381 U.S. 407 (1965), "does not require that the federal and state-court complaints be identical," 507 U.S. at 35, it was addressing the obligation of a federal court to defer to state proceedings, not the jurisdiction of the state court. *Growe* held that the federal plaintiffs' assertion of a claim under the Voting Rights Act did not allow them to proceed to the exclusion of the federal constitutional claim being asserted in state court. This Court did not hold that a federal court would be required to abstain in favor of a state law attack on a congressional redistricting plan or that a state court could entertain such an attack consistent with Art. I, § 4.[9]

In short, because these appellants asserted only state law claims in Chancery Court, this appeal does not present the question of whether state courts can or must hear federal claims involving congressional redistricting.

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congressional districts in Oregon under the Federal Constitution." *Perrin v. Kitzhaber*, No. 0107-07021, slip op. at 1 (Cir. Ct. of Multnomah Cty., Ore., Oct. 19, 2001). Likewise, in New Mexico the trial court ruled, "The current New Mexico congressional districts violate Art. I, § 2 of the Constitution of the United States." Order re: Amendment to the Court's Findings of Fact and Conclusions of Law Filed January 2, 2002, *Jepsen v. Virgil-Giron*, No. D0101-CV-2002-02177 (Dist. Ct. of Santa Fe Cty., N.M. 2002). So far as appears, appellants are the only litigants in the country who have chosen to rely only on state law in pressing their claims.

[9] *Germano*, of course, concerned only legislative redistricting. Thus, it cannot support a contention that state courts can or must adjudicate congressional redistricting claims.

Affirmance of the District Court's decision is not inconsistent with *Growe* or with the more recent state court cases upon which appellants rely.

2. Whether or not the Minnesota Legislature delegated redistricting power to its courts, the Chancery Court here disregarded the express dictate of the Mississippi Legislature that at-large elections be conducted.

In considering whether Art. I, § 4 leaves a role for state courts in congressional redistricting, the District Court considered whether Minnesota's Legislature may have created statutory authority for its courts to hear such cases. The Court noted that in *Cotlow v. Growe*, 622 N.W.2d 561 (Minn. 2001), the Supreme Court of Minnesota relied on two statutes giving its Chief Justice authority to make special assignments in special cases. App. 16a. Concluding that its interpretation of Art. I, § 4 was not precluded by this Court's precedents, the District Court remarked that "there was some, albeit tenuous, legislative authority for the Minnesota Supreme Court's action in *Growe*." App. 18a.

Whether or not the District Court was correct in suggesting that Minnesota's courts may have had legislative authority to proceed, there can be no disputing its conclusion that Mississippi has "no legislative act on which to base the chancery court's authority to act in congressional redistricting." App. 19a.[10] When the Mississippi Legislature fails to redistrict itself or the Circuit or Chancery Courts, Mississippi's Constitution assigns secondary authority respectively to a special commission and to the Supreme Court. Miss. Const. Art. 6, § 152; *id.*,

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[10] As previously noted, this Court will ordinarily accept the lower court's reading of state law. *Regents of University of Michigan, supra*, 474 U.S. at 224 n.10.

Art. 13, § 254. "There is no similar legislative grant for redistricting congressional districts." App. 19a.

It is certainly true, as appellants note, that Art. 6, § 159 of the Mississippi Constitution confers upon the Chancery Court "full jurisdiction in . . . [a]ll matters in equity." J.S. 18. It is equally true that judges who would have been acquainted with the Framers of that Constitution held 70 years ago that "courts of equity deal alone with civil and property rights and not with political rights." *Brumfield, supra,* 142 So. at 746. Neither the Framers nor the legislators who adopted the general jurisdictional statute, Miss. Code Ann. § 9-5-81 (Rev. 1991), intended to delegate redistricting authority to the Chancery Court. While the Supreme Court purported to confer that authority in *In re Mauldin,* the District Court properly observed that it "did not point to any legislative authority that authorized the chancery court to act." App. 21a.

In fact, the Legislature expressly considered its potential failure to agree on a redistricting plan, and it did not choose to delegate authority to the courts. Instead, it provided in Miss. Code Ann. § 23-15-1039 that, under the circumstances presented here, all Representatives should be elected at large. In approving appellants' redistricting plan, the Chancery Court completely ignored the statute the Legislature had adopted to regulate elections to Congress. It is certainly true, as appellants assert, that legislators retain the power to adopt a new plan, assuming that they can agree with each other and the Governor and can get the Attorney General to approve it under § 5. However, it is likewise true that the Legislature has already adopted a plan to govern this year's congressional elections, and it calls for those elections to be held at large. The Chancery Court simply chose to order state election officials to do something else.

Thus, the situation here resembles that decried by the three concurring Justices in *Bush v. Gore,* 531 U.S. 98 (2000). Just as Art. I, § 4 delegates to legislatures the power to prescribe rules for conducting elections to Congress, Art. II, § 1 grants them the authority to direct the manner of election of presidential electors.[11] Here, as in *Bush,* "the clearly expressed intent of the legislature must prevail." *Id.,* at 120 (Rehnquist, C.J., concurring). In imposing its own redistricting plan, the Chancery Court unconstitutionally disregarded that clear intent, as set forth in § 23-15-1039.[12]

The District Court specifically left open the possibility that a legislative delegation of congressional redistricting authority might pass constitutional muster. It noted that a delegation to a special commission had been held constitutional under Art. I, § 4 by the Supreme Court of New Jersey in *Brady v. New Jersey Redistricting Comm'n,* 131 N.J. 594, 622 A.2d 843 (1992). App. 22a-23a n.13. Thus, affirmance of the District Court's judgment will not resolve the question of whether other legislatures may delegate redistricting authority to their courts. It will merely establish that the Mississippi Legislature has never done so.

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[11] As the three dissenting Justices observed, "It is perfectly clear that the meaning of the words 'Manner' and 'Legislature' as used in Article II, § 1, parallels the usage in Article I, § 4 . . . ." *Id.,* at 123 n.1 (Stevens, J., dissenting).

[12] Whether § 23-15-1039 is unenforceable for some other reason is an issue which was not addressed by either the Chancery Court or the District Court. The question was preserved by plaintiffs and the Committee and is presented in their conditional cross-appeal. For purposes of resolving appellants' appeal, it is enough to note that § 23-15-1039, even if unenforceable, is inconsistent with any suggestion that the Legislature delegated redistricting authority to state courts.

Thus, the District Court's judgment is not inconsistent with *Growe*, nor does it inhibit the ability of state legislatures and courts to resolve their own redistricting disputes. That judgment should be affirmed.

CONCLUSION

For the reasons set forth herein, this Court should affirm the judgment of the District Court.

Respectfully submitted,

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IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; MELVIN HORTON; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL **PLAINTIFFS**

vs. **No. G-2001-1777 W/4**

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi **DEFENDANTS**

AMENDED COMPLAINT

(Filed Oct. 17, 2001)

This action for injunctive relief is brought to insure compliance with Mississippi law regarding the timing of congressional elections in the State of Mississippi.

1. Plaintiffs Beatrice Brance and Rims Barber are residents and registered voters of Hinds County, Mississippi and the presently existing Fourth Congressional District. David Rule and Melvin Horton are residents and registered voters of Holmes County, Mississippi and the presently existing Second Congressional District. Plaintiff James Woodard is a resident and registered voter of Webster County, Mississippi and the presently existing First Congressional District. He also is an elected Supervisor in Webster County. Plaintiff Joseph P. Hudson is a resident and registered voter of Harrison County, Mississippi and the presently existing Fifth Congressional District. Plaintiff Robert Norvel is a resident and registered voter of Jackson County, Mississippi and the presently

existing Fifth Congressional District. He also is an elected supervisor in Jackson County. These plaintiffs have an interest in participating as voters in the regularly scheduled 2002 elections for members of Congress from the State of Mississippi. They also have an interest in insuring that the provisions of Mississippi law relating to the scheduling of those election are fully enforced.

2. Defendant Eric Clark is the Secretary of State of Mississippi. Defendant Mike Moore is the Attorney General of Mississippi. Defendant Ronnie Musgrove is the governor of Mississippi. Pursuant to § 23-15-211(1) of the Mississippi Code, the three of them constitute the State Board of Election Commissioners of the State of Mississippi. As occupants of the offices they hold, and as members of the State Board of Election Commissioners, they are responsible for the implementation and enforcement of Mississippi's election laws. They are sued in their official capacities as occupants of the offices they hold and as members of the State Board of Election Commissioners.

3. Mississippi law requires that the first step in decennial redistricting of congressional districts occur by December 3, 2001. Pursuant to § 5-3-123 and § 5-3-129 of the Mississippi Code, the Standing Joint Congressional Redistricting Committee of the Mississippi legislature must draw a congressional redistricting plan and present it to the legislature and governor no later than thirty days preceding the convening of the next regular session of the legislature after the publication of the results of the decennial census. The decennial census results were published in early 2001. The next regular session of the legislature convenes January 2, 2002. See Miss. Code

§ 5-1-7. Thus, the Committee's plan must be presented to the legislature and governor no later than thirty days prior to January 2, which is December 3, 2001.

4. Mississippi law requires that qualification of candidates running for Congress in the 2002 elections occur by March 1, 2002. See Miss. Code § 23-15-299. The new districting plan must be enacted well in advance of that time in order for the qualification to occur as scheduled.

5. As of the present time, the Joint Congressional Redistricting Committee has yet to adopt, recommend, or present a plan to the legislature and governor. The legislature has yet to adopt or implement a plan. Unless the legislature adopts a plan in time for it to be implemented in advance of the March 1 qualifying deadline, the interests of the plaintiffs and all Mississippi voters in enforcement of Mississippi's election laws will be compromised, and their rights under Mississippi law to participate in a congressional election process conducted in a timely manner will be violated.

6. This Court has jurisdiction of actions for injunctive relief of this type.

7. In the event the Committee fails to recommend, and the legislature fails to adopt, a congressional redistricting plan in a timely manner, it will be the duty of this Court to insure enforcement of the laws and to adopt and implement a congressional redistricting plan so that the plan can be in place in sufficient time for the candidate qualification and election process to go forward according to the schedule established by Mississippi law.

Accordingly, the plaintiffs request that this Court assume jurisdiction of this cause and further request that, in the event a congressional redistricting plan is not adopted by the legislature in a timely manner, this Court proceed to hold a hearing and issue an injunction adopting and directing the implementation of a congressional redistricting plan for the State of Mississippi that allows the candidate qualification and election process to go forward as required by Mississippi law. The plaintiffs also request any other relief to which they are entitled.

Respectfully submitted,

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**IN THE CHANCERY COURT OF
THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI**

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; MELVIN HORTON; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,

Plaintiffs,

vs. **No. G-2001-1777 W/4**

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi,

Defendants.

SUPPLEMENTAL RESPONSE OF THE PLAINTIFFS TO THE PENDING MOTIONS TO DISMISS

This supplemental response summarizes and adds to the two responses previously filed by the plaintiffs in opposition to (1) the supplemental motion to dismiss of the defendants (response filed November 26, 2001, and (2) the motion to dismiss of the intervenors (response filed November 28, 2001). Because the two motions make different arguments, we believe it useful to summarize our arguments to both motions in a single response and to elaborate upon at least one of those arguments.

I.

Both the defendants and the intervenors contend this Court has no subject mater jurisdiction. But the United

States Supreme Court has said that "state courts have a significant role in redistricting," ***Growe v. Emison***, 507 U.S 25, 33 (1993), and also has said: "The power of the judiciary of a State to require valid reapportionment or to require a valid redistricting plan has not only been recognized by this Court, but . . . has been specifically encouraged." ***Id., quoting, Scott v. Germano***, 381 U.S. 407, 409 (1965). The Mississippi Supreme Court has made it clear that chancery courts have jurisdiction in election law cases such as this one. ***Carter v. Lake***, 399 So.2d 1356, 1357-1358 (Miss. 1981); ***Adams County Election Commissions v. Sanders***, 586 So.2d 829, 380 (Miss. 1991). ***See also, Hathorn v. Lovorn***, 457 U.S 255, 269-270 (1982).[1]

II.

The intervenors argue that the only remedy for this situation is an at-large statewide election for all members of Congress pursuant to Miss. Code § 23-15-1039. They contend, accordingly, that this Court has no jurisdiction. As we previously noted in our response to the intervenors' motion, their argument regarding this remedy in no way deprives this Court of jurisdiction. Moreover, this is not a viable remedy for a number of reasons.

In filing this case, we have asked this Court to enforce Mississippi law and implement an election plan that complies with Mississippi law. Mississippi law sets

[1] These authorities are discussed in more detail at pages 2-9 of our response to the defendants' supplemental motion to dismiss.

out an election schedule that requires candidate qualification on March 1, 2002, primary elections on June 4, 2002, and the general election on November 5, 2002. Mississippi law also clearly contemplates and requires election of members of Congress by districts. *See*, Miss. Code § 23-15-1033 ("Representatives in the Congress of the United States shall be chosen *by districts* on the first Tuesday after the first Monday of November in the year 1986, and every two (2) years thereafter. . . . "); § 5-3-123 (members of the Standing Joint Congressional Redistricting Committee of the legislature shall draw a plan to redistrict no later than 30 days preceding the next regular session of the legislature and shall submit it to the Governor and the legislature).[2]

But the intervenors contend that the remedy for a legislative impasse resulting from a decrease in the number of seats is set out in Miss. Code § 23-15-1039. They argue that this statute requires at-large elections. However, the statute does not, in fact, require at-large elections. Instead, it mandates at-large balloting only if the election is actually held "before the districts have changed to conform to the new apportionment." The present case is being brought so that this Court can adopt

[2] Although the legislature obviously can adopt a plan without a recommendation from the Committee, the state law giving the Committee the authority to draw such a plan clearly contemplates that districts will be used. Otherwise, there would be no need to draw a plan. And, as just mentioned, § 23-15-1033 specifically states that members of Congress "shall be chosen by districts." ***See also, Adams County Election Commission v. Sanders***, 586 So.2d at 381 (referring to the one-person, one-vote principle of Art 3, § 14 of the Mississippi Constitution).

and implement a redistricting plan containing four congressional districts in time for the 2002 election schedule. Once that is done, the "districts [will] have changed to conform to the new apportionment," and there will be no need for at-large elections under the statute. Nothing in that statute remotely suggests that this Court, as a court of equity, does not have the authority to implement a districting plan in the wake of the legislative default that has occurred here. Thus, the statute does not require at-large elections in the situation that exists here, and it does not deprive this Court of jurisdiction.

Even if the statute did require at-large elections under the present circumstances, that remedy could not be imposed because it would be unlawful both as a matter of Mississippi constitutional law and federal law. First, at-large elections would specifically violate the federal statute requiring election of congressional representatives from districts.[3] 2 U.S.C. § 2c states:

> In each State entitled . . . to more than one Representative . . . there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected *only* from Districts so established . . . .

[3] As previously mentioned, our claim in this case is brought specifically under Mississippi law and seeks to enforce Mississippi law. In response, the intervenors have claimed that § 23-15-1039 requires at-large elections. We raise federal law at this juncture only to show that even if this at-large option were required by that statute, it is not a viable solution because it violates both federal law and the Mississippi Constitution.

(Emphasis added).[4] Second at-large elections would dilute back voting strength by requiring that all members of Congress be elected from a majority-white electorate. This dilution would violate both Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the equal protection component of Article 3, Section 14 of the Mississippi Constitution. ***See, Jordan v. Winter***, 604 F.Supp. 807 (N.D. Miss. 1984) (three-judge court), ***summary aff'd***, 469 U.S. 1002 (1984) (requiring that a majority black congressional district be created in Mississippi).

[4] In 1941, the Congress passed a statute that would have allowed the remedy of at-large elections where the state lost a seat and failed to redistrict. ***See***, 2 U.S.C. § 2a(c)(5). But in 1967, Congress passed the statute just quoted in the text of this brief, 2 U.S.C. § 2c, which specifically mandates that "Representatives shall be elected *only from districts.*" (Emphasis added). As the United States Supreme Court stated in ***Whitcomb v. Chavis***, 403 U.S 124, 159 n. 39 (1971): "In 1941, Congress enacted a law that required that . . . if there is a decrease in the number of representatives and the number of districts in the State exceeds the number of representatives newly apportioned, all representatives shall be elected at large. . . . In 1967, Congress *reinstated the single-member district requirement.*" (Emphasis added). ***See also, Shayer v. Kirkpatrick***, 541 F.Supp. 922, 926-927 (W.D. Mo. 1982) (three-judge court) ("we conclude that the later statute, section 2c, repealed section 2a(c)(5) by implication," so that "the only appropriate remedy is a court-ordered apportionment" rather than at-large elections), ***summarily affirmed sub. nom. Schatzle v. Kirkpatrick***, 456 U.S. 966 (1982); ***Assembly of California v. Deukmajian***, 639 P.2d 939, 954-955 (Cal. 1982) ("Congress intended 2c to supersede the provisions of section 2a, subdivision (c)" and "an at-large election . . . would contravene the congressional mandate set forth in section 2c.").

For all of these reasons, at-large elections are not a viable option, and Miss. Code § 23-15-1039 does not deprive this Court of jurisdiction.

III.

In the supplemental motion to dismiss, the Attorney General contends that the three defendants, the Governor, the Secretary of State, and the Attorney General, are not proper defendants. But in a line of Mississippi redistricting cases going back some 35 years, these three officials always have been the lead state defendants. ***See, e.g., Connor v. Johnson***, 256 F.Supp. 962, 963-964 (S.D. Miss. 1966) (legislative and congressional redistricting); ***Jordan v. Winter***, 541 F.Supp. 1135, 1137 (N.D. Miss. 1982) (congressional redistricting); ***Martin v. Allain***, 658 F.Supp. 1183, 1186 (S.D. Miss. 1987) (judicial districts); ***Watkins v. Mabus***, 771 F.Supp. 789, 792 (S.D. Miss. 1991) (legislative redistricting); ***NAACP v. Fordice***, 252 F.3d 361, 364 (5th Cir. 2001) (public service and transportation commissioners).[5] Neither the courts nor the Mississippi Attorney

[5] Some of these cases also have named legislative leaders as defendants, while others have not (and in one case the legislators voluntarily intervened). The absence of them as defendants in some of the cases suggests, of course, that they are not necessary parties. This is particularly true in light of the fact that the plaintiffs in the present case are not asking the Court to order the legislature to do anything. Instead, the plaintiffs are simply asking that the Court implement a lawful plan for the congressional elections in the event the legislature does not do so on its own. As indicated by the cases just cited, these three state officials – as occupants of their offices and as members of the State Board of Election Commissioners – are the proper defendants for that purpose. If the legislative leaders

General appear ever to have raised a question about whether these are the proper defendants. Moreover, in the parallel federal case that is presently pending and that relates to congressional redistricting, the Attorney General has not filed any motion to dismiss based on this ground, and has not suggested to the court that these are improper defendants.

Clearly, these are proper defendants to represent the interests of the State of Mississippi and to implement any new redistricting plan if the legislative impasse continues and this Court is required to order equitable relief. ***See, Connor v. Finch***, 469 F.Supp. 693, 694 (S.D. Miss. 1979) (imposing new districting plan for legislative elections by issuing injunction solely against Governor, Secretary of State, and Attorney General). These three officials comprise the State Board of Election Commissioners. They all are responsible for upholding and enforcing Mississippi law, and the Secretary of State is the state's chief election officer. This is not a basis for dismissing this case.[6]

IV.

The intervenors contend that the Republican and Democratic executive committees are indispensable parties for the purpose of imposing the remedy. But the committees were not parties in at least some of statewide redistricting litigation that has occurred in Mississippi

wish to participate, they are free to file a motion to intervene or motion for leave to participate *amicus curiae*.

[6] This is discussed more at pages 9-10 of our response to the defendants' supplemental motion to dismiss.

over the years and that has led to new redistricting plans – particularly the thirteen year battle over legislative districts that lasted from 1966-1979. ***See, Connor v. Johnson***, 256 F.Supp. at 963-964; ***Connor v. Finch***, 469 F.Supp. at 694. ***See also, Grove v. Emison***, 507 U.S. at 27-28; ***Emison v. Growe***, 782 F.Supp. 427 (D. Minn. 1992) (three-judge court) (political parties were not defendants in either the state or federal court congressional redistricting cases that led to the Supreme Court's decision in *Growe*, and no one suggested they were necessary parties for congressional redistricting litigation). Under the law, the political parties must hold primaries under whatever plan is adopted by the State or the appropriate court, and as long as the state defendants are included, the political parties need not be named as defendants. This is not a proper basis for a motion to dismiss.[7]

V.

As all parties agree, any plan adopted by this Court must be precleared under Section 5 of the Voting Rights Act. However, the intervenors argue that preclearance must be obtained before this Court even holds hearings. That is simply not correct, and the intervenors cite no case law mandating such a requirement. Indeed, all of the case law demonstrates the contrary. ***See, Hathorn v. Lovorn***, 457 U.S. at 269-270 (United States Supreme Court holds that where a chancery court orders a new election-plan implemented, the change must be precleared, but

[7] This is discussed more at pages 2-3 of our response to the intervenors' motion to dismiss.

the Court never suggested that preclearance should have been obtained before the chancery court held hearings); ***Adams County Election Commission v. Sanders***, 586 So.2d at 830 (same).[8] Redistricting litigation has proceeded in a number of state courts in other states that are covered by Section 5 of the Voting Rights Act, but no court has ever held that preclearance must be obtained before the state court holds hearings.

For all of these reasons, as well as those stated in our prior responses, the motions to dismiss should be denied.

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[8] This is discussed more fully at page 3 of our response to the intervenors' motion to dismiss

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(5)

No. 01-1437

Supreme Court, U.S.
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In The

Supreme Court of the United States

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,

Appellants,

v.

JOHN ROBERT SMITH; SHIRLEY HALL; and GENE WALKER,

and

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

BRIEF OPPOSING MOTION TO AFFIRM

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BRIEF OPPOSING MOTION TO AFFIRM

The appellees point out that if an appeal can be resolved on statutory grounds, this Court normally will not address constitutional questions. Motion to Affirm at 5 n.2. But here, the matter cannot be resolved simply on statutory grounds. As noted in the supplement to our jurisdictional statement, the United States Department of Justice (DOJ) has refused to consider the Section 5 preclearance submission any further because of the District Court's constitutional holding. Thus, even if this Court rejects the Section 5 arguments we have made and affirms the District Court's injunction on Section 5 grounds, the constitutional issue must be addressed. Otherwise, the State of Mississippi will be unable to obtain further preclearance review because of the spectre of the District Court's constitutional holding.

That holding prevents not only the implementation of the existing state court plan, but any future plan the state courts may adopt if, for any reason, the existing plan is vacated or modified in the course of the appeal to the Supreme Court of Mississippi. As mentioned at p. 5 n. 9 of the jurisdictional statement, this case will therefore remain alive irrespective of the outcome of that appeal.

The supplement to our jurisdictional statement attaches the April 23, 2002 motion we filed in the District Court seeking to have the state court plan declared precleared in light of the fact that the second sixty day statutory period expired without any Section 5 objection. The District Court, having retained jurisdiction of this case, J.S. App. 2a, likely will issue a ruling on that motion soon. But this Court should not await that ruling before deciding whether to note probable jurisdiction. The injunction will remain in place and review of this appeal will be required either way. It is important that the appeal move forward and, if probable jurisdiction is noted, that the briefing and argument occur sooner rather than later. While the resolution of this appeal likely will come too late to affect this

year's congressional elections, it will affect the 2004 elections. A reasonably prompt decision on the matters raised by this appeal will make it easier to plan for those elections not only in Mississippi, but in other states where state courts have adjudicated congressional redistricting cases in circumstances that the District Court here would have held to be unconstitutional. *See*, J.S. 14.[1]

The Article I, § 4 Issue

Perhaps recognizing the unsettling scope of the District Court's constitutional ruling, the appellees do not try to defend it. Instead, they offer a much narrower rationale for the outcome. They do not assert that Art. I, § 4 prevents state courts from enforcing federal law in congressional redistricting cases, but instead say the present case is an exception because no federal claim was raised in the complaint. They also contend that Miss. Code Ann. § 23-15-1039 — providing that representatives shall be chosen at-large if the number of congressional representatives is decreased and the next election is held "before the districts shall have changed to conform to the new apportionment" — precludes Mississippi's courts from adjudicating these cases as a matter of federal constitutional law.

Of course, that's not what the District Court held. Instead, it said state courts are powerless to adopt a congressional plan, even in the wake of a legislative default, unless an "enactment of the . . . legislature grants to the . . . court the power to redistrict . . . for congressional elections." J.S. App. 7a. State law provisions giving the courts general jurisdiction to enforce the law through equitable relief are insufficient, said the District

[1] If this Court notes probable jurisdiction before the District Court motion is decided, the parties can tailor the briefing on the merits in light of any subsequent decision by the District Court.

Court. *Id.* 20a. At no point in its constitutional ruling did the District Court rely upon any failure to raise a federal claim in the state court complaint or upon the presence of § 1039. Instead, the District Court held that no state court could implement a congressional redistricting plan in the course of any type of lawsuit unless the power to do so is spelled out in a state statute.

The appellees come close to conceding that this holding is wrong with respect to state court cases raising federal claims. In the course of a discussion of Art. I, § 4, as well as other constitutional provisions that specify the power of state legislatures, the appellees admit that "[s]tate courts are obliged by the Supremacy Clause of Art. VI to enforce federal law. . . ." Mot. Aff. 18. *See also, id.* 22 ("federal claims may be litigated notwithstanding Art. I, § 4"). But because of their contention that only state law claims were raised in the complaint here, they argue that Art. I, § 4 precludes the state courts from adopting a plan. Had a federal claim been included in the complaint, they imply, it would be a different ball game.

But this ignores the fact that, to quote again the appellees' language from page 18 of the Motion to Affirm, "[s]tate courts are obliged by the Supremacy Clause of Art. VI to enforce federal law" even in cases where only state law claims are in the complaint. In *Hathorn v. Lovorn*, 457 U.S. 255, 258, 269-70 (1982), the complaint raised only state law claims, yet this Court held that the state courts had "the duty" to enforce federal law.

Of course, any congressional redistricting plan adopted by a state court must, of necessity, comply with federal law, including the equal population requirement of Art. I, § 2, the specification of a particular number of representatives pursuant to the apportionment required by Art. I, § 2, the use of districts to elect representatives pursuant to 2 U.S.C. § 2c, the equal

protection clause of the Fourteenth Amendment, and the Voting Rights Act. Moreover, in the present situation, as in most instances when state courts are called upon to adjudicate these matters, the pre-existing plan — designed prior to the last census — did not comply with either state or federal law. In Mississippi, it complied with neither the equal population requirement of Art. I, § 2 of the federal constitution nor what the Mississippi Supreme Court has described as "the one person, one vote standard . . . under Miss. Const. Art. 3, § 14." *Adams County Election Commission v. Sanders*, 586 So. 2d 829, 831 (Miss. 1991). Similarly, it did not comply with the new apportionment inasmuch as the state lost a seat, going from five to four. Thus, whether or not federal law claims were raised in the complaint, the state courts of Mississippi, in adopting a plan, were required to comply with federal law and cure a pre-existing federal law violation.

If, as the appellees suggest, the Supremacy Clause of Art. VI gives a state court the power and the duty to enforce federal law and cure federal violations in a congressional redistricting case where federal claims are raised in the complaint, surely that court also may enforce state law and cure state law violations in that case (as long as state law does not run afoul of federal law). If state courts can cure both federal and state law violations when federal claims are raised in the complaint, it follows that they also can do so when only state law claims are raised in the complaint. Nothing about the word "Legislature" in Art. I, § 4 suggests that a state court is precluded from implementing a new congressional districting plan and curing a clear violation of both federal and state law simply because the complaint only raises state law claims.

A different scenario would be presented if the legislature had adopted a plan that complied with federal law, and the state court cast aside the plan on the sole ground that it violated state law. Whether that would make a difference for purposes of Art.

I, § 4 is immaterial since that did not happen here.[2] Instead, the Mississippi legislature failed to adopt a new plan even though one was required by both federal and state law. The action of the Mississippi courts in curing the resulting federal and state law violations did not violate Art. I, § 4.[3]

According to the appellees, it is important that this Court be able to review congressional redistricting cases. Indeed, they say, "[t]he Framers surely would have understood that any litigation to enforce [the equal population requirement of] Art. I, § 2 would be fully reviewable by this Court." Mot. Aff. 22. But, of course, any congressional redistricting plan imposed by a state court *must* comply with all provisions of federal law. If it does not, a federal question exists and the plan can be reviewed and vacated by this Court. It matters not whether the complaint raises federal claims, state claims, or both.

In an effort to harmonize the District Court's decision with *Growe v. Emison*, 507 U.S. 25 (1993), the appellees mention not only the purported distinction between federal law and state law complaints, but also the presence of Miss. Code Ann. § 23-15-1039. According to the appellees:

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[2] The cases cited at J.S. 17-18 suggest that Art. I, § 4 would not prevent the state courts from acting in such a situation.

[3] In an ongoing effort to tarnish the courts of Mississippi, the appellees allege that legislators "continued their intrigues in . . . testimony before the Chancery Court," Mot. Aff. 21, and that allowing state courts to hear these cases "increases the likelihood that legislators may choose . . . to seek political results from selected state judges." *Id.* 21-22. No state judges were "selected" here. The state court case was filed in the court of equity in Hinds County, which is the seat of state government. It could have been assigned to any of four judges through the random assignment process in the clerk's office. Neither the state court plaintiffs nor their counsel had any inkling which of the four judges might be chosen. Only one legislator testified in state court, and he simply discussed, at a pretrial hearing, the status of the unsuccessful legislative efforts.

> [T]he legislature expressly considered its potential failure to agree on a [congressional] redistricting plan, and it did not choose to delegate authority to the courts. Instead, it provided in Miss. Code Ann. § 23-15-1039 that, under the circumstances presented here, all Representatives should be elected at large.

Mot. Aff. 28. Again, this was not the District Court's reasoning, which instead held that state courts have no power unless a statute specifically gives them the authority to adjudicate congressional redistricting cases. As explained at pages 13-14 of our jurisdictional statement, that holding would leave few state courts, including the Minnesota courts in *Growe*, with the power to hear these cases.

Moreover, as we previously stated when discussing § 1039 in the Section 5 context, J.S. 25-26, that statute says nothing about who can or should adopt redistricting plans, and in no way precludes the state courts from exercising their equitable authority to hear these cases. At-large elections are envisioned under § 1039 only if the election is held "before the districts shall have changed to conform to the new apportionment." If a state court, exercising its equitable power in the wake of a legislative default, draws a proper plan, the districts will have been "changed to conform to the new apportionment" and § 1039 will be satisfied. That statute has no relevance to the question of whether Art. I, § 4 precludes state courts from implementing congressional districting plans.

Furthermore, it does not distinguish Mississippi from other states. Although Art. I, § 4 authorizes legislatures to determine the time, place, and manner of choosing congressional representatives, it also provides that Congress may alter the time, place, and manner as it sees fit. Congress has passed 2 U.S.C. § 2a(c), which contains provisions almost identical to those in § 1039 for elections held when the number of

representatives has changed and the state is not redistricted prior to the next election. If, as the appellees contend, Mississippi's legislature has chosen the at-large alternative as the only possible remedy in the case of a legislative deadlock, thus precluding state court power under Art. I, § 4, it could as easily be said that Congress has chosen this alternative for all fifty states, and that state courts nowhere have power in congressional redistricting cases. But surely that is not correct, particularly in light of this Court's decision in *Growe*.[4]

The Section 5 Issue

In the supplement to our jurisdictional statement, we explained that the state court plan was precleared by the Attorney General's failure to impose an objection during the second sixty-day period, which expired April 22, 2001. We contend that the DOJ has no power under the statute to suspend or disregard the statutory review period simply because the federal court's injunction is based, in part, on constitutional grounds. *See, Morris v. Gressette*, 432 U.S. 491, 502 (1977) ("compliance with § 5 is measured solely by the absence, for whatever reason, of a timely objection on the part of the

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[4] There is a later federal statute, 2 U.S.C. § 2c, requiring congressional representative elections "only from Districts" that supersedes both 2 U.S.C. § 2(a)c and Miss. Code Ann. § 23-15-1039. Even if it does not supersede them, as at least one court has held, *Carstens v. Lamm*, 543 F. Supp. 68, 77-78 (D. Colo. 1982), it allows the at-large scheme to be used only "in the event that no constitutional redistricting plan exists on the eve of a congressional election, and there is not enough time for either the Legislature or the courts to develop an acceptable plan." This also comports with the common-sense reading of § 1039, which would require at-large elections only if the election is held "before the districts shall have changed to conform to the new apportionment." *See also*, Miss. Code Ann. § 23-15-1033 (requiring congressional representative elections from "by districts").

Attorney General"). If we are correct about this point, there will be no need for this Court to resolve the other Section 5 issues raised in our jurisdictional statement and discussed in the motion to affirm. Nevertheless, we will briefly respond to some of the points in the motion to affirm.

The appellees repeatedly refer to the Mississippi Supreme Court's decision in *In Re Mauldin*, No. 2001-M-01891 (Miss. Dec. 13, 2001) as a "reassignment" of redistricting authority that requires federal approval under Section 5. This implies the authority was taken from the legislature and "reassigned" to the courts. But no authority was taken from the legislature. Instead, the courts simply exercised the equitable power they always have had to fill the breach caused by an unprecedented legislative failure to design a post-census redistricting plan in compliance with federal and state law principles that had evolved over the previous decades. In our view, the exercise of that equitable power does not constitute (to use the language of Section 5) a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964."[5]

The appellees argue that *In re Mauldin* was a change from Miss. Code Ann. § 23-15-1039 because that statute, they say, requires at-large elections whenever the number of seats is diminished and the legislature deadlocks. But as we explained at pages 25-26 of the jurisdictional statement, and again earlier

[5] The appellees say that "neither the District Court nor the [DOJ] decided that a state court must obtain preclearance before adjudicating a federal claim." Mot. Aff. 11. The DOJ and the District Court, however, did not state their position with that limitation, instead suggesting that any state court assumption of jurisdiction is a voting change irrespective of the issues adjudicated. Moreover, in the present case, the Chancery Court did, in fact, cure federal law violations, and also adjudicated federal law issues by insuring that the new plan complied with federal law. J.S. App. 120a-124a.

in this brief, § 1039 mandates at-large elections only if the districts cannot be drawn in time for the new election. It in no way precludes courts from drawing the districts and is not inconsistent with *In re Mauldin*.

Our reading of § 1039, say the appellees, is "fanciful." Mot. Aff. 12. But the Mississippi Supreme Court already has rejected their position as a matter of Mississippi law. The Mississippi Republican Executive Committee (MREC), which is an appellee here, and the state court intervenors argued to the state supreme court in their petition for writ of prohibition that § 1039 was the legislature's exclusive remedy for a deadlock in this situation and that the state courts therefore had no power. We contended otherwise, making the same argument we make here. As is clear from the outcome in *In re Mauldin*, the Mississippi Supreme Court concluded that § 1039 is not, as a matter of Mississippi law, a barrier to the exercise of state court jurisdiction.

Our reading of § 1039, confirmed by *In re Mauldin*, is corroborated by the interpretation of the similar provisions of the federal statute, 2 U.S.C. § 2a(c)(5), by the federal court in *Carstens v. Lamm*. This is described more fully in footnote 4 of this brief. In addition, the Federal District Court here, which adopted a districting plan rather than the at-large elections requested by the appellees under § 2a(c)(5), apparently interpreted that federal statute the same way as did the *Carstens* court. Clearly, it is not "fanciful" to read either § 1039 or 2 U.S.C. § 2a(c)(5) to require at-large elections only if a legislature or a court is unable to draw districts in time for the election.

In response to our contention that the DOJ's February 14, 2001 request for unnecessary and irrelevant information did not suspend the initial sixty-day review period, the appellees point to *Foreman v. Dallas County*, 521 U.S. 979 (1997), and argue

as follows:

> If reassignment of electoral authority among state officials can ever be subject to § 5, as *Foreman* holds, then it can hardly be frivolous for the Department to investigate the possible consequences of that reassignment.

Mot. Aff. 15. But even if *In re Mauldin* somehow is a voting change, it is not a "reassignment" of authority. While *Foreman* involved the displacement of one procedure for selecting election judges who supervised voting at the polls with a different procedure, no displacement of redistricting authority occurred here. The courts of Mississippi were not substituted for the legislature. Instead, the equitable jurisdiction of the courts was invoked to implement a redistricting plan in accordance with the law. As explained at pages 26-29 of our jurisdictional statement, the information requested by the DOJ was not necessary to make the determination required by Section 5.

The appellees also claim that not only is *In re Mauldin* a voting change, but that the state court redistricting plan cannot be submitted for Section 5 review until the *In re Mauldin* decision has been approved by the United States Attorney General. Mot. Aff. 14, 16. However, even the DOJ, which has strained to find reasons to postpone a preclearance decision on the plan, has not used that excuse. *In re Mauldin* and the state court plan were submitted together by Mississippi's Attorney General. Nothing about Section 5 suggests that the plan itself has yet to be submitted under the statute.

Conclusion

This Court should note probable jurisdiction and reverse the decision of the District Court.

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In The
Supreme Court of the United States

BEATRICE BRANCH, *et al.*,

Appellants, Cross-Appellees,

v.

JOHN ROBERT SMITH, *et al.*,

Appellees, Cross-Appellants.

On Appeal From The United States District Court For The Southern District Of Mississippi

JOINT APPENDIX

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APPENDIX 1

U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI (JACKSON)

No. 01-CV-855

Smith, et al.

v.

Clark, et al.

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
11/1/01	COMPLAINT.
11/1/01	Magistrate Judge Assignment James C. Sumner.
11/1/01	Case assigned to Pending Track - designation of appropriate track will be made after Case Management Conference and a final track assignment.
11/2/01	SUMMONS(ES) issued for defendant Eric Clark, defendant Mike Moore, defendant Ronnie Musgrove, defendant MS Republican Pty., defendant MS Democratic Party
11/8/01	MOTION by plaintiff John Robert Smith, plaintiff Shirley Hall, plaintiff Gene Walker for Preliminary Injunction

Date	PROCEEDINGS
11/9/01	MOTION by movant Richard Barrett to Intervene by Richard Barrett
11/9/01	AFFIDAVIT by movant Richard Barrett Re: [3-1] motion to Intervene by Richard Barrett by movant.
11/13/01	ANSWER to Complaint by defendant MS Republican Pty. (Attorney Michael B. Wallace).
11/14/01	RESPONSE by defendant Eric Clark, defendant Mike Moore, defendant Ronnie Musgrove to [2-1] motion for Preliminary Injunction by plaintiffss and CROSS-MOTION, to Dismiss.
11/14/01	Rule 16.1(A) Initial Order; copies mailed.
11/14/01	Telephonic Case Management Conference set 10:30 1/22/02 location: Jackson, MS before Magistrate Judge James C. Sumner copies mailed to Michael B. Wallace, Arthur F. Jernigan Jr.
11/16/01	ORDER, Response to Motion reset to 11/26/01 for [6-2] motion, Reply to Response to Motion reset to 11/29/01 for [6-2] motion. Court intends to request certification of 3-judge court to address motion for preliminary injunction as well as State Defendants' motion to dismiss (signed by Judge Henry T. Wingate).
11/21/01	Minute entry: Hearing held on 11/14/01 before Judge Wingate, CR. Brenda Wolverton; Status Conference held a schedule was initiated.

Date	PROCEEDINGS
11/21/01	ORDER the Chief Judge of the US Court of Appeals for the Fifth Circuit designates Henry T. Wingate, E. Grady Jolly and David C. Bramlette, III, U. S. circuit and district judges as members of the three-judge district court to hear and resolve this matter.
11/21/01	Case assigned to panel of Judge Henry T. Wingate and Judge E. G. Jolly and Judge David C. Bramlette III
11/21/01	RESPONSE by defendant MS Democratic Party to [2-1] motion for Preliminary Injunction by plaintiffs.
11/26/01	RESPONSE by defendant MS Republican Pty. to [2-1] motion for Preliminary Injunction by plaintiffs
11/28/01	NOTICE of Hearing: Motion Hearing set for 3:00 11/30/01 for [6-2] motion, set for 3:00 11/30/01 for [3-1] motion to Intervene by Richard Barrett, set for 3:00 11/30/01 for [2-1] motion for Preliminary Injunction.
11/29/01	MOTION by movants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph P Hudson, Robert R. Norvel Sr. to Intervene
11/30/01	REPLY by defendant Eric Clark, defendant Mike Moore, defendant Ronnie Musgrove to response to [6-2] motion by defendants.

Date	PROCEEDINGS
12/4/01	NOTICE of Submission of Intervenors regarding recent State Court Developsments by movants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph P Hudson, Robert R. Norvel Sr.
12/5/01	ORDER granting [14-1] motion to Intervene, denying [6-2] motion, denying [3-1] motion to Intervene by Richard Barrett, deferred [2-1] motion for Preliminary Injunction
12/6/01	NOTICE of Attorney Appearance for defendant MS Democratic Party by John G. Jones, Herbert Lee Jr. in place of Shane Langston and Omar Nelson
12/18/01	RESPONSE by defendant MS Republican Pty. to Motion for Leave to Amend and For Preliminary Injunction.
12/19/01	NOTICE of Hearing: Motion for Leave to Amend and for Preliminary Injunction set before three-judge court 12/28/01 at 3:00p.m.
12/20/01	MOTION by plaintiffs for Preliminary Injunction, for Leave to File Amended Complaint
12/21/01	RESPONSE by defendant Eric Clark, defendant Mike Moore, defendant Ronnie Musgrove to [21-1] motion for Preliminary Injunction by plaintiffs, [21-2] motion for Leave to File Amended Complaint by plaintiffs

Date	PROCEEDINGS
12/21/01	RESPONSE by intervenor-defendants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph Hudson, Robert R. Norvel Sr. to [21-1] motion for Preliminary Injunction by plaintiffs, [21-2] motion for Leave to File Amended Complaint by plaintiffs
12/28/01	Motion hearing held re: redistricting plan
1/7/02	ORDER granting [21-2] motion for Leave to File Amended Complaint; Granting Motion for Branch and Barber to Intervene; Motion for Preliminary Injunction deferred; Briefing Schedule established as set out herein
1/8/02	AMENDED COMPLAINT by plaintiffs John Robert Smith, Shirley Hall, Gene Walker
1/9/02	SUPPLEMENTAL RESPONSE by defendants Eric Clark, Mike Moore, Ronnie Musgrove to [21-1] motion for Preliminary Injunction by plaintiffs
1/9/02	MOTION to Intervene by Jimmy D. Giles
1/10/02	Supplemental RESPONSE by intervenor-defendant Beatrice J. Branch, et al., to [21-1] motion for Preliminary Injunction.
1/10/02	ORDER denying [27-1] motion to Intervene by Jimmy D. Giles
1/10/02	Minute entry: Hearing held 12/28/01 before Judges Jolly, Wingate, Bramlette in Jackson, MS, on redistricting plan. Carol Gray c/r. ACTION TAKEN: Under advisement.

Date	PROCEEDINGS
1/10/02	EXHIBITS TO REDISTRICTING HEARING
1/11/02	MOTION by movant Jimmy D. Giles For Rehearing EN BANC
1/11/02	Supplemental Submission of Mississippi Republican Executive Committee in Connection with Motion for Preliminary Injunction
1/15/02	ORDER, that because it now appears to be uncertain that the State authorities will have a redistricting plan in place by 3/1/02, Federal authorities will assert jurisdiction. Accordingly, Federal authorities will begin the process of drafting and implementing a plan for reapportioning Mississippi's congressional districts. In accordance with this order, a scheduling conference is set Scheduling Conference for 3:30 1/16/02
1/18/02	Letter requesting attachment of Exhibits to Amended Complaint by plaintiff John Robert Smith
1/18/02	SCHEDULING ORDER setting Designate experts for plaintiff by 3:00 1/18/02 ; Designate experts for defendant by 3:00 1/18/02 ; Parties shall exchange exhibits by 5:00 1/23/02; Any party may take depositions at any time inclusive of 1/19-24/02; Pretrial order is due by 2:00 1/25/02; Trial set 9:30 1/28/02 and shall conclude no later that 5:00 on 1/29/02; Telephonic Case Management Conference previously scheduled 10:30 1/22/02 is CANCELED.

Date	PROCEEDINGS
1/25/02	MOTION by movant Kenneth J. Goodwin for Consideration of Redistricting Map.
1/28/02	Submission of Mississippi Farm Bureau Federation Relating to Congressional Redistricting.
1/28/02	TRANSCRIPT filed for dates of 12/28/01 on Hearing on Motion for Preliminary Injunction
1/29/02	EXHIBIT/WITNESS LIST TO HEARING HELD 1/28/02 AND 1/29/02
1/29/02	Minute entry: Redistricting Hearing held 1/28/02 and 1/29/02 before Judges Jolly, Wingate and Bramlett in Jackson, MS. CR: Brenda Wolverton; Action Taken: Parties declined presentation of closing summations. Post Trial Briefs may be filed with deadline of 1/31/02.
1/29/02	PRETRIAL ORDER filed
1/30/02	NOTICE of Filing of Submission of the Attorney General to United States Department of Justice and the State Court Record with the Clerk of Court on 1/18/02 by plaintiff John Robert Smith, plaintiff Gene Walker
1/30/02	Letter from David Webb with redistricting plan map attached.
1/31/02	Post-Trial Submission of Intervenors
2/1/02	TRANSCRIPT filed for dates of 1/28/02-1/29/02
2/4/02	ORDER with attached Courts congressional redistricting plan for the State of Mississippi. Objections due by 2/9/02 at 4:00p.m.

Date	PROCEEDINGS
2/8/02	Second Supplemental Submission of Mississippi Republican Executive Committee in Connection with Motion for Preliminary Injunction
2/8/02	Comments of the Plaintiffs and Mississippi Republican Executive Committee
2/8/02	Response by intervenor-defendants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph Hudson, Robert R. Norvel Sr. to [44-1] order
2/15/02	NOTICE of Receipt of Letter from United States Department of Justice by defendant Eric Clark, defendant Mike Moore, defendant Ronnie Musgrove
2/15/02	Further submission/Attachment by Beatrice J. Branch, et al., intervenor-defendants, in opposition to motion for injunctive relief
2/15/02	Third Supplemental Submission of Mississippi Republican Executive Committee in Connection with Motion for Preliminary Injunction
2/19/02	ORDER that parties are directed to address by simultaneous letter briefs to question set out herein by 5:00p.m.
2/19/02	OPINION that if Chancery Court plan has not been precleared before the close of business 2/25/02, the plan attached to Order of 2/4/02 shall operate as the plan for congressional districts for the State of Mississippi for 2002 congressional elections and, on 2/26/02, an injunction shall be entered directing

Date	PROCEEDINGS
	defendants to conduct 2002 congressional elections pursuant to the congressional redistricting plan attached to 2/4 order.
2/19/02	MOTION by intervenor-defendants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph Hudson, Robert R. Norvel Sr. to Stay, and For Injunction
2/19/02	RESPONSE by plaintiffs John Robert Smith, Shirley Hall, Gene Walker to [53-1] motion to Stay by intervenor-defends
2/20/02	ORDER denying [53-1] motion to Stay, denying [53-2] motion For Injunction
2/21/02	PRETRIAL ORDER filed
2/21/02	Fourth Supplemental Submission of Mississippi republican Executive Committee in connection with Motion for Preliminary Injunction
2/25/02	Intervenors Additional Further Submission in Opposition to Plaintiff's Motion for Injunctive Relief
2/26/02	OPINION and ORDER in the light of the foregoing analysis, the congressional redistricting plan adopted by the chancery court is declared unconstitutional, and the state's implementation of the chancery court plan is enjoined, as per our Final Judgment entered today.
2/26/02	FINAL JUDGMENT For reasons stated in opinions of 2/29/02, and 2/26/02, defendants are hereby enjoined from implementing the

Date	PROCEEDINGS
	congressional redistricting plan adopted by Chancery Court for the First Judicial District of Hinds County, Mississippi. The defendants are enjoined from implementing the former five-district congressional redistricting plan. The defendants implement the congressional redistricting plan adopted by this court in its order of 2/4/02, for conducting congressional primary and general elections for the state of Mississippi in 2002. Defendants shall use the congressional redistricting plan adopted by this court in its order of 2/4/02, in all succeeding congressional primary and general elections for the State of Mississippi. This court shall retain jurisdiction to implement, enforce, and amend this order as shall be necessary and just.
2/26/02	Case closed
2/26/02	NOTICE OF APPEAL to Supreme Court by intervenor-defendants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph Hudson, Robert R. Norvel Sr.
3/8/02	MOTION by plaintiff John Robert Smith, plaintiff Shirley Hall, plaintiff Gene Walker for Attorney Fees
3/12/02	NOTICE of filing of Affidavit of Pat H. Scanlon in Support of Motion for Attorney's Fees by plaintiff John Robert Smith, plaintiff Shirley Hall, plaintiff Gene Walker

Date	PROCEEDINGS
3/19/02	MOTION by defendants Eric Clark, Mike Moore, Ronnie Musgrove To Hold in Abeyance, or to Extend Time to Respond to Motion for Attorney Fees
4/23/02	MOTION by intervenor-defendants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph Hudson, Robert R. Norvel Sr. to Declare that the State Court Plan in now Precleared under Section 5 of the Voting Rights Act
5/6/02	Letter from Supreme Court advising an appeal was filed 4/26/02 and placed on docket 4/29/02
5/28/02	TRANSCRIPT filed for dates of 11/14/01
6/3/02	ORDER denying [65-1] motion to Declare that the State Court Plan in now Precleared under Section 5 of the Voting Rights Act.

APPENDIX 2

IN THE CHANCERY COURT OF
HINDS COUNTY, MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER;
L.C. DORSEY; DAVID RULE; MELVIN HORTON;
JAMES WOODARD; JOSEPH P. HUDSON; and
ROBERT NORVEL PLAINTIFFS

vs. No. G-2001-1777 W/4

ERIC CLARK, Secretary of State of
Mississippi; MIKE MOORE, Attorney General
of Mississippi; RONNIE MUSGROVE, Governor
of Mississippi DEFENDANTS

AMENDED COMPLAINT

(Filed Oct. 17, 2001)

This action for injunctive relief is brought to insure compliance with Mississippi law regarding the timing of congressional elections in the State of Mississippi.

1. Plaintiffs Beatrice Brance and Rims Barber are residents and registered voters of Hinds County, Mississippi and the presently existing Fourth Congressional District. David Rule and Melvin Horton are residents and registered voters of Holmes County, Mississippi and the presently existing Second Congressional District. Plaintiff James Woodard is a resident and registered voter of Webster County, Mississippi and the presently existing First Congressional District. He also is an elected Supervisor in Webster County. Plaintiff Joseph P. Hudson is a resident and registered voter of Harrison County, Mississippi and the presently existing Fifth Congressional District. He also is an elected supervisor in Jackson County. These plaintiffs have an interest in participating as voters in the regularly scheduled 2002 elections for members of Congress from the State of Mississippi. They also have an interest in insuring that the provisions of Mississippi law relating to the scheduling of those election are fully enforced.

2. Defendant Eric Clark is the Secretary of State of Mississippi. Defendant Mike Moore is the Attorney General of Mississippi. Defendant Ronnie Musgrove is the governor of Mississippi. Pursuant to § 23-15-211(1) of the Mississippi Code, the three of them constitute the State Board of Election Commissioners of the State of Mississippi. As occupants of the offices they hold, and as members of the State Board of Election Commissioners, they are responsible for the implementation and enforcement of Mississippi's election laws. They are sued in their official capacities as occupants of the offices they hold and as members of the State Board of Election Commissioners.

3. Mississippi law requires that the first step in decennial redistricting of congressional districts occur by December 3, 2001. Pursuant to § 5-3-123 and § 5-3-129 of the Mississippi Code, the Standing Joint Congressional Redistricting Committee of the Mississippi legislature must draw a congressional redistricting plan and present it to the legislature and governor no later than thirty days preceding the convening of the next regular session of the legislature after the publication of the results of the decennial census. The decennial census results were published in early 2001. The next regular session of the legislature convenes January 2, 2002. See Miss. Code

§ 5-1-7. Thus, the Committee's plan must be presented to the legislature and governor no later than thirty days prior to January 2, which is December 3, 2001.

4. Mississippi law requires that qualification of candidates running for Congress in the 2002 elections occur by March 1, 2002. See Miss. Code § 23-15-299. The new districting plan must be enacted well in advance of that time in order for the qualification to occur as scheduled.

5. As of the present time, the Joint Congressional Redistricting Committee has yet to adopt, recommend, or present a plan to the legislature and governor. The legislature has yet to adopt or implement a plan. Unless the legislature adopts a plan in time for it to be implemented in advance of the March 1 qualifying deadline, the interests of the plaintiffs and all Mississippi voters in enforcement of Mississippi's election laws will be compromised, and their rights under Mississippi law to participate in a congressional election process conducted in a timely manner will be violated.

6. This Court has jurisdiction of actions for injunctive relief of this type.

7. In the event the Committee fails to recommend, and the legislature fails to adopt, a congressional redistricting plan in a timely manner, it will be the duty of this Court to insure enforcement of the laws and to adopt and implement a congressional redistricting plan so that the plan can be in place in sufficient time for the candidate qualification and election process to go forward according to the schedule established by Mississippi law.

Accordingly, the plaintiffs request that this Court assume jurisdiction of this cause and further request that, in the event a congressional redistricting plan is not adopted by the legislature in a timely manner, this Court proceed to hold a hearing and issue an injunction adopting and directing the implementation of a congressional redistricting plan for the State of Mississippi that allows the candidate qualification and election process to go forward as required by Mississippi law. The plaintiffs also request any other relief to which they are entitled.

Respectfully submitted,

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APPENDIX 3

**IN THE CHANCERY COURT OF
THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI**

**BEATRICE BRANCH; RIMS BARBER;
L.C. DORSEY; DAVID RULE; MELVIN HORTON;
JAMES WOODARD; JOSEPH P. HUDSON;
and ROBERT NORVEL,**

Plaintiffs,

vs. **No. G-2001-1777 W/4**

**ERIC CLARK, Secretary of State of
Mississippi; MIKE MOORE, Attorney General
of Mississippi; RONNIE MUSGROVE, Governor
of Mississippi,**

Defendants.

SUPPLEMENTAL RESPONSE OF THE PLAINTIFFS TO THE PENDING MOTIONS TO DISMISS

This supplemental response summarizes and adds to the two responses previously filed by the plaintiffs in opposition to (1) the supplemental motion to dismiss of the defendants (response filed November 26, 2001, and (2) the motion to dismiss of the intervenors (response filed November 28, 2001). Because the two motions make different arguments, we believe it useful to summarize our arguments to both motions in a single response and to elaborate upon at least one of those arguments.

I.

Both the defendants and the intervenors contend this Court has no subject mater jurisdiction. But the United

States Supreme Court has said that "state courts have a significant role in redistricting," *Growe v. Emison*, 507 U.S 25, 33 (1993), and also has said: "The power of the judiciary of a State to require valid reapportionment or to require a valid redistricting plan has not only been recognized by this Court, but . . . has been specifically encouraged." *Id., quoting, Scott v. Germano*, 381 U.S. 407, 409 (1965). The Mississippi Supreme Court has made it clear that chancery courts have jurisdiction in election law cases such as this one. *Carter v. Lake*, 399 So.2d 1356, 1357-1358 (Miss. 1981); *Adams County Election Commissions v. Sanders*, 586 So.2d 829, 380 (Miss. 1991). *See also, Hathorn v. Lovorn*, 457 U.S 255, 269-270 (1982).[1]

II.

The intervenors argue that the only remedy for this situation is an at-large statewide election for all members of Congress pursuant to Miss. Code § 23-15-1039. They contend, accordingly, that this Court has no jurisdiction. As we previously noted in our response to the intervenors' motion, their argument regarding this remedy in no way deprives this Court of jurisdiction. Moreover, this is not a viable remedy for a number of reasons.

In filing this case, we have asked this Court to enforce Mississippi law and implement an election plan that complies with Mississippi law. Mississippi law sets

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[1] These authorities are discussed in more detail at pages 2-9 of our response to the defendants' supplemental motion to dismiss.

out an election schedule that requires candidate qualification on March 1, 2002, primary elections on June 4, 2002, and the general election on November 5, 2002. Mississippi law also clearly contemplates and requires election of members of Congress by districts. *See*, Miss. Code § 23-15-1033 ("Representatives in the Congress of the United States shall be chosen *by districts* on the first Tuesday after the first Monday of November in the year 1986, and every two (2) years thereafter. . . . "); § 5-3-123 (members of the Standing Joint Congressional Redistricting Committee of the legislature shall draw a plan to redistrict no later than 30 days preceding the next regular session of the legislature and shall submit it to the Governor and the legislature).[2]

But the intervenors contend that the remedy for a legislative impasse resulting from a decrease in the number of seats is set out in Miss. Code § 23-15-1039. They argue that this statute requires at-large elections. However, the statute does not, in fact, require at-large elections. Instead, it mandates at-large balloting only if the election is actually held "before the districts have changed to conform to the new apportionment." The present case is being brought so that this Court can adopt

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[2] Although the legislature obviously can adopt a plan without a recommendation from the Committee, the state law giving the Committee the authority to draw such a plan clearly contemplates that districts will be used. Otherwise, there would be no need to draw a plan. And, as just mentioned, § 23-15-1033 specifically states that members of Congress "shall be chosen by districts." ***See also, Adams County Election Commission v. Sanders***, 586 So.2d at 381 (referring to the one-person, one-vote principle of Art 3, § 14 of the Mississippi Constitution).

and implement a redistricting plan containing four congressional districts in time for the 2002 election schedule. Once that is done, the "districts [will] have changed to conform to the new apportionment," and there will be no need for at-large elections under the statute. Nothing in that statute remotely suggests that this Court, as a court of equity, does not have the authority to implement a districting plan in the wake of the legislative default that has occurred here. Thus, the statute does not require at-large elections in the situation that exists here, and it does not deprive this Court of jurisdiction.

Even if the statute did require at-large elections under the present circumstances, that remedy could not be imposed because it would be unlawful both as a matter of Mississippi constitutional law and federal law. First, at-large elections would specifically violate the federal statute requiring election of congressional representatives from districts.[3] 2 U.S.C. § 2c states:

> In each State entitled . . . to more than one Representative . . . there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected *only* from Districts so established . . . .

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[3] As previously mentioned, our claim in this case is brought specifically under Mississippi law and seeks to enforce Mississippi law. In response, the intervenors have claimed that § 23-15-1039 requires at-large elections. We raise federal law at this juncture only to show that even if this at-large option were required by that statute, it is not a viable solution because it violates both federal law and the Mississippi Constitution.

(Emphasis added).[4] Second at-large elections would dilute back voting strength by requiring that all members of Congress be elected from a majority-white electorate. This dilution would violate both Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the equal protection component of Article 3, Section 14 of the Mississippi Constitution. *See, Jordan v. Winter*, 604 F.Supp. 807 (N.D. Miss. 1984) (three-judge court), *summary aff'd*, 469 U.S. 1002 (1984) (requiring that a majority black congressional district be created in Mississippi).

[4] In 1941, the Congress passed a statute that would have allowed the remedy of at-large elections where the state lost a seat and failed to redistrict. *See*, 2 U.S.C. § 2a(c)(5). But in 1967, Congress passed the statute just quoted in the text of this brief, 2 U.S.C. § 2c, which specifically mandates that "Representatives shall be elected *only from districts*." (Emphasis added). As the United States Supreme Court stated in *Whitcomb v. Chavis*, 403 U.S 124, 159 n. 39 (1971): "In 1941, Congress enacted a law that required that . . . if there is a decrease in the number of representatives and the number of districts in the State exceeds the number of representatives newly apportioned, all representatives shall be elected at large. . . . In 1967, Congress *reinstated the single-member district requirement*." (Emphasis added). *See also, Shayer v. Kirkpatrick*, 541 F.Supp. 922, 926-927 (W.D. Mo. 1982) (three-judge court) ("we conclude that the later statute, section 2c, repealed section 2a(c)(5) by implication," so that "the only appropriate remedy is a court-ordered apportionment" rather than at-large elections), *summarily affirmed sub. nom. Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982); *Assembly of California v. Deukmajian*, 639 P.2d 939, 954-955 (Cal. 1982) ("Congress intended 2c to supersede the provisions of section 2a, subdivision (c)" and "an at-large election . . . would contravene the congressional mandate set forth in section 2c.").

For all of these reasons, at-large elections are not a viable option, and Miss. Code § 23-15-1039 does not deprive this Court of jurisdiction.

III.

In the supplemental motion to dismiss, the Attorney General contends that the three defendants, the Governor, the Secretary of State, and the Attorney General, are not proper defendants. But in a line of Mississippi redistricting cases going back some 35 years, these three officials always have been the lead state defendants. *See, e.g., Connor v. Johnson*, 256 F.Supp. 962, 963-964 (S.D. Miss. 1966) (legislative and congressional redistricting); *Jordan v. Winter*, 541 F.Supp. 1135, 1137 (N.D. Miss. 1982) (congressional redistricting); *Martin v. Allain*, 658 F.Supp. 1183, 1186 (S.D. Miss. 1987) (judicial districts); *Watkins v. Mabus*, 771 F.Supp. 789, 792 (S.D. Miss. 1991) (legislative redistricting); *NAACP v. Fordice*, 252 F.3d 361, 364 (5th Cir. 2001) (public service and transportation commissioners).[5] Neither the courts nor the Mississippi Attorney

[5] Some of these cases also have named legislative leaders as defendants, while others have not (and in one case the legislators voluntarily intervened). The absence of them as defendants in some of the cases suggests, of course, that they are not necessary parties. This is particularly true in light of the fact that the plaintiffs in the present case are not asking the Court to order the legislature to do anything. Instead, the plaintiffs are simply asking that the Court implement a lawful plan for the congressional elections in the event the legislature does not do so on its own. As indicated by the cases just cited, these three state officials – as occupants of their offices and as members of the State Board of Election Commissioners – are the proper defendants for that purpose. If the legislative leaders

General appear ever to have raised a question about whether these are the proper defendants. Moreover, in the parallel federal case that is presently pending and that relates to congressional redistricting, the Attorney General has not filed any motion to dismiss based on this ground, and has not suggested to the court that these are improper defendants.

Clearly, these are proper defendants to represent the interests of the State of Mississippi and to implement any new redistricting plan if the legislative impasse continues and this Court is required to order equitable relief. ***See, Connor v. Finch***, 469 F.Supp. 693, 694 (S.D. Miss. 1979) (imposing new districting plan for legislative elections by issuing injunction solely against Governor, Secretary of State, and Attorney General). These three officials comprise the State Board of Election Commissioners. They all are responsible for upholding and enforcing Mississippi law, and the Secretary of State is the state's chief election officer. This is not a basis for dismissing this case.[6]

IV.

The intervenors contend that the Republican and Democratic executive committees are indispensable parties for the purpose of imposing the remedy. But the committees were not parties in at least some of statewide redistricting litigation that has occurred in Mississippi

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wish to participate, they are free to file a motion to intervene or motion for leave to participate *amicus curiae*.

[6] This is discussed more at pages 9-10 of our response to the defendants' supplemental motion to dismiss.

over the years and that has led to new redistricting plans – particularly the thirteen year battle over legislative districts that lasted from 1966-1979. ***See, Connor v. Johnson***, 256 F.Supp. at 963-964; ***Connor v. Finch***, 469 F.Supp. at 694. ***See also, Grove v. Emison***, 507 U.S. at 27-28; ***Emison v. Growe***, 782 F.Supp. 427 (D. Minn. 1992) (three-judge court) (political parties were not defendants in either the state or federal court congressional redistricting cases that led to the Supreme Court's decision in *Growe*, and no one suggested they were necessary parties for congressional redistricting litigation). Under the law, the political parties must hold primaries under whatever plan is adopted by the State or the appropriate court, and as long as the state defendants are included, the political parties need not be named as defendants. This is not a proper basis for a motion to dismiss.[7]

V.

As all parties agree, any plan adopted by this Court must be precleared under Section 5 of the Voting Rights Act. However, the intervenors argue that preclearance must be obtained before this Court even holds hearings. That is simply not correct, and the intervenors cite no case law mandating such a requirement. Indeed, all of the case law demonstrates the contrary. ***See, Hathorn v. Lovorn***, 457 U.S. at 269-270 (United States Supreme Court holds that where a chancery court orders a new election plan implemented, the change must be precleared, but

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[7] This is discussed more at pages 2-3 of our response to the intervenors' motion to dismiss.

the Court never suggested that preclearance should have been obtained before the chancery court held hearings); ***Adams County Election Commission v. Sanders,*** 586 So.2d at 830 (same).[8] Redistricting litigation has proceeded in a number of state courts in other states that are covered by Section 5 of the Voting Rights Act, but no court has ever held that preclearance must be obtained before the state court holds hearings.

For all of these reasons, as well as those stated in our prior responses, the motions to dismiss should be denied.

Respectfully submitted,

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Counsel for Plaintiffs

[8] This is discussed more fully at page 3 of our response to the intervenors' motion to dismiss

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered by fax and by first class mail to the following:

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This 3rd day of December, 2001.

/s/ Robert B. McDuff
Counsel for Plaintiffs

APPENDIX 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN ROBERT SMITH, ET AL. PLAINTIFFS

VS. CIVIL ACTION NO. 3:01CV855WS

ERIC CLARK, ET AL. DEFENDANTS

COURT REPORTER'S TRANSCRIPT OF HEARING

BEFORE THE THREE-JUDGE PANEL CONSISTING OF:

HONORABLE E. GRADY JOLLY
UNITED STATES CIRCUIT JUDGE

HONORABLE HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

HONORABLE DAVID C. BRAMLETTE, III
UNITED STATES DISTRICT JUDGE

Jackson, Mississippi
January 16, 2002

APPEARANCES:

MR. ROBERT B. MCDUFF
MR. CARLTON W. REEVES

Representing the Intervenors

MR. MICHAEL B. WALLACE
MR. ARTHUR F. JERNIGAN, JR.
MR. F. KEITH BALL
MR. GRANT M. FOX
MR. CHRISTOPHER R. SHAW
MS. STACY O'NEILL

Representing the Plaintiffs

* * *

[p. 11] MR. MCDUFF: Thank you, Your Honor. Let me mention a couple of sort of general things and then get down to the specifics. One thing that would affect the time involved is whether at large elections are on the table. Our view is that at large elections are not permissible, particularly where the court has the opportunity and the time to draw a plan. If there were something the court was actively considering, we would need to put on evidence, I believe, to bolster our contingent or to refute any contrary contention that –

JUDGE JOLLY: I think I can tell you that that is a reasonably remote – I mean we are assuming, and, in fact, the reason that we are acting as we are is a determination to make sure that the election under one plan or another begins the process on March 1st. And that assumes that there will be districts drawn.

MR. MCDUFF: Okay, very well. That being the case, it would be unnecessary for us to present evidence regarding whether at large elections would violate Section 2 of the Voting Rights Act.

* * *

APPENDIX 5

U.S. Department of Justice

Civil Rights Division

JDR:RSB:TCH:RJD:nj
DJ 166-012-3
2001-4084

Voting Section
950 Pennsylvania Avenue, Room 7254
Washington, D.C. 20530

April 1, 2002

The Honorable Michael Moore
Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205-0220

Dear Mr. Attorney General:

This refers to the Orders dated December 21 and 31, 2001, of the Chancery Court of Hinds County in *Branch v. Clark* adopting a 2001 congressional redistricting plan and the Order dated December 13, 2001, of the Supreme Court of Mississippi in *In Re Mauldin*, authorizing the Chancery Court to adopt a congressional redistricting plan, for the State of Mississippi, submitted to the Attorney Gneral pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our February 14, 2002, request for additional information on February 19-20, 2002.

We understand that the federal court in *Smith v. Clark* (S.D. Miss.) has found the changes effected by the Orders in *Branch v. Clark*, and *In Re Mauldin*, to be unconstitutional

under Article I, Section 4 of the United States Constitution, and has enjoined their implementation on that basis. We further understand that applications for an emergency stay have been sought and denied by the United States Supreme Court, but that an appeal remains pending. Where voting changes submitted by the State have been enjoined by a federal court, they are not presently capable of administration, and are not ripe for review by the Attorney General. Accordingly, it would be inappropriate for the Attorney General to make a determination concerning your submission now. *See Procedures for the Administration of Section 5* (28 C.F.R. 51.22(a), 51.35). If the injunction against implementation of these changes is lifted, upon notification, the Attorney General will again consider these changes for preclearance unless the state notifies us of its intent to alter them. Any documentation previously provided need not be resubmitted. Refer to File No. 2001-4084 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

/s/ Joseph D. Rich
Joseph D. Rich
Chief, Voting Section

APPENDIX 6

IN THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

JOHN ROBERT SMITH, SHIRLEY HALL, and GENE WALKER,
Plaintiffs,

vs. **No. 3:01cv855**

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,
Defendants,

and

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,
Intervenors.

INTERVENORS' MOTION TO DECLARE THAT THE STATE COURT PLAN IS NOW PRECLEARED UNDER SECTION 5 OF THE VOTING RIGHTS ACT

[filed April 23, 2002]

This Court's February 26 injunction against the state court congressional redistricting plan was based on (1) the holding

that preclearance under Section 5 of the Voting Rights Act had not been obtained, and (2) the additional holding that even if preclearance is obtained, the courts of Mississippi have no power to act in matters of congressional redistricting in light of Article I, § 4 of the United States Constitution. Because of intervening events, we contend that the plan has now unquestionably been precleared. Accordingly, we move this Court to declare that it is precleared. Although the injunction will remain in place in light of the constitutional holding, a holding that the plan has been precleared will narrow the issues in the pending appeal before the United States Supreme Court.

Section 5 provides that a redistricting plan is precleared if "the [United States] Attorney General has not interposed an objection within sixty days after [the] submission" of the plan. 42 U.S.C. § 1973c. A second sixty-day review period under Section 5 has now passed without an objection by the Attorney General. While the Department of Justice claimed in an April 1, 2002 letter that this Court's federal constitutional ruling renders the state court plan incapable of administration, and therefore "not ripe" for Section 5 review, the language of Section 5 does not allow for postponement of the sixty day period on that ground. Thus, the plan has been precleared.

This Court's February 26 order specifically retained jurisdiction of this case. Although the injunction has been appealed to the Supreme Court, this Court has the authority to resolve matters that arise in the interim. At present, the injunction is based both upon the constitutional ruling and the Section 5 ruling. We contend that intervening events require the Section 5 ruling to be vacated. This Court should promptly address the matter in the first instance. Although the Supreme Court appeal will remain in place irrespective of this Court's decision on the matter, that decision will affect the scope of the appeal. For example, if this Court declares the plan now

precleared, the Supreme Court likely will not need to address any of the additional Section 5 issues that presently are raised in the appeal.

In further support of this motion, the following is submitted:

On February 14, 2002, the United States Department of Justice requested more information regarding the State's December 26, 2001 submission under Section 5. The Mississippi Attorney General submitted that information on February 19, 2002. The United States Department of Justice contended that this request restarted the original sixty day statutory review period under Section 5 once the additional information was submitted. Over the intervenors' objection, this Court agreed. On February 26, 2002, with no decision having been made by the United States Attorney General under Section 5, this Court enjoined implementation of the state court congressional redistricting plan that had been included in the December 26 submission.

Even if this Court was correct that the February 14 request for more information invalidated the original sixty day statutory review period, the review period was restarted on February 19 when the Mississippi Attorney General submitted the additional information. That period expired on or before April 22, 2002, which was the first weekday after the sixtieth day after February 19. Under the terms of Section 5, the state court plan "may be enforced" if "the Attorney General has not interposed an objection within sixty days after [the] submission" of the plan. Because the Attorney General has not interposed an objection on or before April 22, the plan has been precleared.

Other than the February 14 request for more information,

the only formal communication from the United States Department of Justice to the Mississippi Attorney General regarding the Section 5 submission came on April 1, 2002. In a letter dated that day, the Chief of the Voting Section of the Civil Rights Division acknowledged that the additional information was received on February 19-20. However, the April 1 letter also stated that, in light of this Court's Article I, § 4 holding, "it would be inappropriate for the Attorney General to make a determination concerning [the] submission now." The letter said: "Where voting changes submitted by the State have been enjoined by a federal court, they are not presently capable of administration, and are not ripe for review by the Attorney General." The letters added that "[i]f the injunction against implementation of these changes is lifted, . . . the Attorney General will again consider these changes for preclearance." (A copy of the April 1 letter is attached as Exhibit 1. A copy of the February 19 submission of the additional information is attached as Exhibit 2).

However, this Court's Article I, § 4 holding does not postpone the statutory sixty-day review period. Section 5 provides that when any covered state "enact[s] or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it may obtain the requisite federal preclearance "if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . ." The State of Mississippi, through its courts, has "enact[ed] or seek[s] to administer"the state court redistricting plan. This is reflected in the Mississippi Supreme Court's December 13, 2001 ruling and the December 21 opinion and order of the Chancery Court of Hinds County.

This Court's holding to the effect that the Mississippi courts do not have that power as a matter of federal constitutional law does not change the fact that the state courts have "enact[ed]" or "seek to administer" the state court plan.

Although the April 1 Department of Justice stated that the plan is not "presently capable of administration" because of this Court's constitutional injunction, Section 5 does not require that the plan be "capable of administration." It simply requires that the state authorities "enact or seek to administer" the plan. Once the plan is submitted, the statutory sixty day review period begins. Nothing in the statute allows the Attorney General to postpone the sixty day period simply because a federal court enjoins the plan on federal constitutional grounds.

In *Morris v. Gressette*, 432 U.S. 491 (1977), the Supreme Court noted that under Section 5, a covered jurisdiction may preclear a voting change by obtaining a declaratory judgment from the Federal District Court for the District of Columbia or, alternatively, "may submit [the] change . . . to the Attorney General and subsequently may enforce the change if 'the Attorney General has not interposed an objection within sixty days after such submission.'" *Id.* at 502. Under this alternative method, said the Court, "compliance with § 5 is measured solely by the absence, for whatever reason, of a timely objection on the part of the Attorney General." *Id.* The Court added:

> We think it clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. The congressional intent is plain: The extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission. Although there was to be no bar to subsequent constitutional challenges to the implemented legislation, there also was to be "no dragging out" of the extraordinary federal remedy beyond the period specified in the statute.

Id. at 504. Also, the Court pointed out that "the Attorney General's failure to object is not conclusive with respect to the constitutionality of the submitted state legislation." *Id.* at 505.

Thus, the Supreme Court recognized that federal courts might enjoin voting changes on constitutional grounds independent of any Section 5 review. At the same time, the Court said review by the Attorney General must provide an "expeditious" means of preclearance and may not be "'dragg[ed] out' . . . beyond the period specified in the statute." This strongly indicates that a constitutional injunction does not postpone the statutory sixty day review period.

The need for a prompt decision on a Section 5 submission, independent of any constitutional injunction, is illustrated by the fact that "States must often redistrict in the most exigent circumstances." *Growe v. Emison*, 507 U.S. 25, 35 (1993). If a federal court enjoins a redistricting plan on constitutional grounds, the injunction is subject to being vacated on appeal, perhaps through emergency review. However, if the United States Attorney General can postpone the sixty day period when an injunction is entered, the covered jurisdiction will be unable to implement the plan promptly even if the injunction is vacated. The jurisdiction will be required to await renewal and completion of the interrupted Section 5 review process. The language of Section 5 does not allow for this sort of delay.

Of course, if the Attorney General is unable — as we

contend — to postpone the sixty period, there is the possibility that the completion of the Section 5 review process will have been in vain if the constitutional injunction is not lifted on appeal. But if Congress had believed this to be a problem, it would have written the statute to stop the sixty day period when such an injunction was issued. It did not do so, and the statutory terms of Section 5 do not allow for suspension of the review period on this basis.

In light of the foregoing, this motion should be granted.

Respectfully submitted,

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[certificate omitted in printing]

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN ROBERT SMITH, SHIRLEY HALL, AND GENE WALKER — **PLAINTIFFS**

V. — **CIVIL ACTION NO. 3:01-CV-855WS**

ERIC CLARK, Secretary of State of Mississippi, MIKE MOORE, Attorney General for the State of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPBULICAN EXECUTIVE COMMITTEE; AND MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE DEFENDANTS

AND

BEARTRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL — **INTERVENORS**

ORDER

[filed June 3,2002]

IT IS ORDERED that the Intervenors' Motion to Declare that the State Court Plan is Now Precleared Under Section 5 of the Voting Rights Act is DENIED.

SO ORDERED, this 3d day of June, 2002.

/s/ E. Grady Jolly
E. GRADY JOLLY
United States Circuit Judge

/s/ Henry T. Wingate
HENRY T. WINGATE
United States District Judge

/s/ David C. Bramlette
DAVID C. BRAMLETTE
United States District Judge

No. 01-1437

Supreme Court, U.S.
FILED
AUG 26 2002
CLERK

In The
Supreme Court of the United States

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,

Appellants,

v.

JOHN ROBERT SMITH; SHIRLEY HALL; GENE WALKER, and MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE;

and

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

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QUESTIONS PRESENTED

1. Does Article I, § 4 of the United States Constitution deprive state courts, acting pursuant to their general equitable jurisdiction, of all power in congressional redistricting cases in the many states where no state statute explicitly speaks of such power?

2. Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which provides without qualification that if a state "enact[s] or seek[s] to administer" a voting change, the change is precleared "if [it] has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days," may the Attorney General extend the statutory sixty day period on the ground that the voting change has been enjoined by a federal court for independent reasons?

3. If a state court, in the course of adhering to developments in the law, assumes jurisdiction and hears a type of voting rights case it has never heard before, does it thereby "enact or seek to administer [a] voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force and effect on November 1, 1964" (to quote Section 5), such that the mere assumption of jurisdiction (independent of any remedial order) must be precleared by the Attorney General or the federal district court for the District of Columbia under Section 5?

4. Is a state statute requiring at-large congressional elections when the number of representatives is diminished and the "election . . . occur[s] . . . before the districts shall have changed to conform to the new apportionment," violated by a state court's decision to change the districts *before the election occurred* such that the decision is a voting change that must be precleared under Section 5 independent of the plan itself?

5. May the Attorney General extend the statutory sixty day review period by requesting additional information from the covered state if the information sought is unnecessary to the Section 5 evaluation?

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The February 26, 2002 final judgment of the District Court is unpublished and is reproduced in the appendix to the Jurisdictional Statement (J.S. App. 1a). The opinions and orders of the District Court are published and reproduced in the appendix to the Jurisdictional Statement as follows: February 26, 2002, 189 F.Supp.2d 548 (S.D. Miss. 2002), 4a; February 19, 2002, 189 F.Supp.2d 529, 25a; February 4, 2002, 189 F.Supp.2d 512, 62a; January 15, 2002, 189 F.Supp.2d 503, 90a; December 5, 2001, 189 F.Supp.2d 501, 107a. The December 13, 2001 order of the Supreme Court of Mississippi is unpublished and reproduced at J.S. App.110a. The opinions and orders of the Chancery Court of Hinds County, Mississippi are unpublished and reproduced in the appendix to the Jurisdictional Statement as follows: December 31, 2001 (judgment), 113a; December 31, 2001 (order), 115a; December 21, 2001, 117a; December 13, 2001, 161a; December 13, 2001, 164a; December 13, 2001, 166a; December 7, 2001, 168a; December 7, 2001, 171a; December 7, 2001, 175a; December 6, 2001, 178a; December 3, 2001, 180a; December 3, 2001, 183a; November 19, 2001, 187a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1253. The District Court's judgment was entered on February 26, 2002. A notice of appeal was filed the same day. J.S. App. 239a. The Jurisdictional Statement was filed and the appeal was docketed on March 28, 2002. This Court noted probable jurisdiction on June 10, 2002.

STATUTES AND CONSTITUTIONAL PROVISIONS

Article I, § 4 of the United States Constitution provides in part:

> The Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as

to the Places of Chusing Senators.

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, provides in part:

> Whenever a State or political subdivision subject to [this section] shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . such qualification, prerequisite, standard, practice, or procedure may be enforced . . . if [it] has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . .

STATEMENT OF THE CASE

Overview

With the 2000 census, Mississippi lost a seat in Congress, its delegation in the next House of Representatives reduced from five to four. When the legislature failed to enact a new redistricting plan, the Mississippi courts addressed the problem in a lawsuit filed in the Chancery Court of Hinds County. Acting pursuant to a Mississippi Supreme Court order issued in the case, the Chancery Court adopted a plan after a five day trial. The plan was submitted for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, over sixty days prior to the candidate qualifying deadline. On the fiftieth day, the United States Department of Justice (DOJ) propounded a request for more information regarding not the plan itself, but the Mississippi Supreme Court ruling confirming the Chancery Court's jurisdiction. Despite the Mississippi Attorney General's prompt response, providing the new information five days later, the DOJ contended that the sixty day clock began anew and declined to make a decision prior to the qualifying deadline.

Armed with this refusal, a three-judge panel of the United States District Court for the Southern District of Mississippi, acting in a separate lawsuit, enjoined implementation of the state court plan on the ground that it had not been precleared and designed its own plan for the congressional elections. In addition, the federal court held that Article I, § 4 of the United States Constitution, which provides that the manner of holding congressional elections "shall be prescribed in each State by the Legislature thereof," prohibits courts in states like Mississippi from involvement in congressional redistricting cases pursuant to their general equitable jurisdiction. State courts may hear such cases, said the District Court, only if the legislature has passed a statute specifically authorizing them to do so. Subsequently, the DOJ cited this constitutional ruling of the District Court to justify a further delay in the Section 5 review process, saying that it will not grant or deny preclearance unless and until the constitutional injunction is lifted on appeal by this Court.

This appeal from the three-judge District Court decision raises the questions of whether Art. I, § 4 prohibits state courts from adjudicating congressional redistricting cases as part of their general equitable jurisdiction, and whether the Mississippi state court plan has been precleared given that (to quote Section 5) "the Attorney General has not interposed an objection within sixty days" of either the original submission or the response providing the additional information that the DOJ requested.

The State Court Case and the Preclearance Submission

This case grows out of the Mississippi legislature's failure, in a November, 2001 special session, to agree on a new redistricting plan in the wake of the loss of a seat. This was the first time in several decades that the legislature had not adopted a congressional plan after the decennial census. *See*, FRANK R. PARKER, BLACK VOTES COUNT 42 (mentioning 1932, 1952, and

1962 plans); *Jordan v. Winter*, 541 F. Supp. 1135, 1138, 1142 (N.D. Miss. 1982), *rev'd*, 461 U.S. 921 (1983) (mentioning 1972 and 1981 plans). In October, shortly before the special session, a lawsuit was filed by the appellants here, Beatrice Branch, et al., who are black and white voters from around the state, in the Chancery Court of Hinds County, which is the county encompassing the state capitol in Jackson. Concerned that the legislature might deadlock, the plaintiffs asked the Court to adopt a lawful plan if the legislature defaulted. The state defendants (the Governor, Secretary of State, and Attorney General, who collectively comprise the State Board of Election Commissioners) moved to dismiss the case, as did several other voters (the Mauldin state court intervenors) who intervened and opposed the plaintiffs. The motions to dismiss were denied. J.S. App. 183a, 187a.[1] The matter was reviewed by the Supreme Court of Mississippi on a pretrial petition challenging, among other things, the Chancery Court's jurisdiction. By a 7-1 vote, the Court held that "the Hinds County Chancery Court has jurisdiction of this matter" and that "[a]ny congressional redistricting plan adopted by the chancery court . . . will remain in effect, subject to any congressional redistricting plan which may be timely adopted by the Legislature." *In Re Mauldin*, No. 2001-M-01891 (Miss. Dec. 13, 2001), J.S. App.110a-112a.

The Chancery Court then heard the case during a five-day trial spanning December 14-19. Eleven different plans were submitted into evidence, some by the Branch plaintiffs and others by the Mauldin intervenors. In weighing the competing merits of the plans, the Court heard evidence from nineteen witnesses and compiled a record containing 58 exhibits. The state defendants did not propose plans, present evidence, or offer argument. On December 21, the Court adopted what was

[1] The entire state court record, as well as the Section 5 preclearance submission and subsequent Department of Justice letters, have been made a part of the present federal court record.

known as Branch Plan 2A. J.S. App. 117a .[2]

Consistent with the holding in *Hathorn v. Lovorn*, 457 U.S. 255 (1982), that state court-ordered voting changes are subject to Section 5's preclearance requirement, the state court plan was submitted by the Mississippi Attorney General to the United States Attorney General for Section 5 preclearance on December 26 , well over sixty days prior to the March 1, 2002 candidate qualifying deadline and over five months prior to the June 4 primary election. J.S. App. 221a. In an abundance of caution, the submission also listed the State Supreme Court's December 13 order in *In Re Mauldin*, *id.* 227a-228a , with the caveat that the inclusion of any item in the submission is not a concession that the item must be precleared under Section 5. *Id.* 225a. The Mississippi Attorney General's submission requested a decision by January 31, 2002 in light of the March 1 qualifying deadline. *Id.* 221a-222a, 225a. On the same day of the submission, December 26, the Deputy Chief of the Voting Section, Civil Rights Division, United States Department of Justice (DOJ), acknowledged receipt in writing and stated the submission "will commence the sixty (60) day time period for administrative review under Section 5 of the Voting Rights Act." *Id.* 220a.

[2] As the Chancery Court explained, the plan contained a zero deviation. No one contended that it diluted minority voting strength in violation of Section 2 of the Voting Rights Act or that it was retrogressive in violation of Section 5. While in the pre-existing plan, one of five districts was majority black, one of four is majority black in the state court plan. Under the existing five-district plan, the majority-black District 2 had a 61.1% black voting age population (BVAP) under 2000 census data. Under the state court's four-district configuration, which necessarily requires larger districts, District 2 has a 59.02% BVAP, thus retaining a strong BVAP majority. Also, the Chancery Court stated that, among other considerations, it adopted the plan that best provided parity and a competitive district between the supporters of the two incumbents who were thrown together by the loss of a seat. J.S. App. 117a-135a.

In the meantime, no one asked the Mississippi Supreme Court to stay the Chancery Court plan. The state defendants did not appeal the decision. The Mauldin state court intervenors and the Mississippi Republican Executive Committee (MREC) did.[3] But while claiming to be aggrieved by the state court plan, they did not notice their appeal until January 25, 2002, J.S. App. 241a, twenty-five days after the Chancery Court's December 31 final judgment, *Id.* 113a, and thirty-five days after its December 21order adopting the plan. *Id.* 117a. They made no request for expedited appellate review. Instead, the MREC and another group of individuals, represented by some of the same lawyers representing the Mauldin state court intervenors, turned to federal court for relief.

The Federal Court Case and the Preclearance Review

The present federal court case had been filed in early November of 2001 by John Robert Smith, et al (the Smith federal plaintiffs) asking the United States District Court for the Southern District of Mississippi to order at-large congressional elections in Mississippi, or alternatively to design the plan itself. Named as defendants were the same state officials named in the state court case, as well as the Mississippi Republican and Democratic executive committees. The MREC aligned itself with the federal plaintiffs. The Branch state court plaintiffs (who are appellants here) were permitted to intervene in the federal case and advocate deference to the state court

[3] The MREC was not a named defendant in the state court case. At one point, it and the Mississippi Democratic Executive Committee (MDEC) were joined as necessary parties at the request of the state defendants. J.S. App.178a. However, the Chancery Court later reconsidered and vacated the ruling, nevertheless making it clear that either or both of the executive committees remained free to intervene voluntarily. *Id.* 161a-163a, 171a. Neither did so. However, the MREC has joined the state court appeal on the ground that it had, at one time, been joined as a party in the state court case.

plan.

Shortly after the state court plan was adopted and submitted for preclearance, the federal court announced that it would interject itself into the process and draw its own plan. Suggesting it believed that timely preclearance should not and would not be granted, the Court said in a January 15, 2002 order: "it now appears uncertain whether the State authorities can have a redistricting plan in place by March 1, 2002," and "it is necessary to assert our jurisdiction and to . . . begin to draft a plan for reapportioning Mississippi's congressional districts . . . ." J.S. App. 91a. In that order, the federal court concluded not only that the state court plan was a voting change requiring preclearance, but that the Mississippi Supreme Court's December 13 decision affirming the Chancery Court's jurisdiction also required preclearance.

Although never suggesting that the redistricting plan itself was retrogressive, the federal court went on to say that it had "serious doubts" as to whether the plan and the December 13 decision would be precleared prior to the March 1 qualifying deadline. *Id.* 98a. Weighing into a substantive Section 5 matter beyond its purview, the Court said with respect to the state supreme court's December 13 ruling: "it is not at all clear that this change is not retrogressive with respect to minority voting rights, in the sense that redistricting decisions will depend on the individual views of an individual judge, elected by a small percentage of the State's voters." *Id.* 100a. As if providing a blueprint for delay to the Department of Justice, the District Court added:

> [I]t appears to us that, at the very least, the Attorney General of the United States will consider these implications very carefully, and might perhaps request more information from State authorities to clarify what is embodied in the change and the consequences thereof.

Id. 100a. The Court said it would set the case for trial. *Id.* 105a.

Trial commenced in federal court on January 28, 2002 and concluded on January 29. The Smith federal court plaintiffs and the MREC submitted a number of proposed plans.[4] The Branch federal court intervenors (who are appellants here and plaintiffs in the state court) continued to urge the federal court to defer to the state court plan. As in the state court, the state defendants did not participate in the federal court trial or offer plans. Neither did the defendant Mississippi Democratic Executive Committee (MDEC). No party in the federal case asserted that the particular lines in the state court plan violated the Fourteenth Amendment, the Voting Rights Act, or any other provision of federal law. Although not challenging the lines themselves, the Smith plaintiffs and the MREC contended that the state courts have no power to adopt a plan in light of Article I, § 4 of the federal constitution.

On February 4, 2002, the Federal District Court announced its own redistricting configuration, stating that its plan would be implemented "absent timely preclearance" of the state court plan. J.S. App. 62a. The federal plan was significantly different from the state court's. The federal court made no pretense of adhering to the policies reflected in the state court configuration, particularly in District 3, which in both plans combined the two junior incumbents, one Republican and one Democrat, but which was drawn very differently in the two plans. While the state court plan was chosen in part because of undisputed evidence that it provided parity and a roughly competitive district between the supporters of the two incumbents, J.S. App. 130a-131a, the federal court made no such effort. Instead, where the state court plan created a district that slightly favored the Republican candidate, the federal court

[4] The same attorneys who represented the Mauldin state court intervenors were among those representing the Smith federal plaintiffs.

district gave that candidate a much stronger advantage.[5] With respect to the majority black district, District 2, the federal plan contained a 59.2% BVAP majority, essentially the same percentage as the 59.0% figure in the state court plan, although the exact geographical composition of the district was different. (The federal plan is described at J.S. App. 64a-65a, the state plan at J.S. App. 134a-135a).

On February 14, fifty days after the submission of the state court plan, the Chief of the Voting Section of the Civil Rights Division of the DOJ faxed a letter to the Mississippi Attorney General. J.S. App. 191a. The letter explained that "the Department is not formally seeking additional information regarding the redistricting plan." *Id.* 195a. Instead, the Department did what the District Court suggested it do: It propounded three pages of questions that it said related to the state supreme court's December 13 ruling, adding that it believed the "basis for the . . . decision is unclear." The Department asked for (among other things) the "state's view of the legal basis for the Mississippi Supreme Court's decision to vest a Chancery Court with jurisdiction to create and implement a statewide redistricting plan;" "detailed information about the nature and structure of state Chancery Courts, e.g., the number

[5] In the state court plan, 47% of the population of the combined district came from old District 3, represented by the Republican, and 44% from old District 4, represented by the Democrat. In the federal plan, 60% came from the old 3rd and 39% from the old 4th. In the precincts in the combined district in the state court plan, Republican candidates won 50% of the vote in the 1999 gubernatorial election, 54% in the 2000 U.S. House elections, and 59% in the 2000 presidential election. In the precincts in the combined federal court district, Republican candidates won 57% of the vote in the 1999 gubernatorial election, 58% in the 2000 U.S. House elections, and 65% in the 2000 presidential election. *See* Intervenor's Objections and Comments Regarding the Proposed Federal Court Plan, filed in the District Court Feb. 8, 2002, pp. 8-9; J.S. App. 130a-131a (December 21, 2001 Chancery Court opinion).

. . . of judges, how [they] are selected, . . . the demographic breakdown of the districts from which such judges are selected; . . . the limits imposed on Chancery Court jurisdiction;" a description of "any safeguards in place to ensure that a particular Chancery Court judge who creates and imposes a state-wide redistricting plan has him/herself been selected in a manner reflecting the political influence of the State's minority populations;"a description of "any existing legal procedure that would prevent a potential litigant from 'forum shopping';" an "explanat[ion of] any laws and/or court rules . . . impacting the selection of venue for state Chancery Courts," and an "explana[tion of] whether Chancery Court decisions are appealable, by right, by any party to the suit." *Id.* 193a-195a. Additionally, the letter asked: "Please explain the state's view of the relationship between this change in procedure [the December 13 ruling] and Miss. Code Annot. 23-15-1039." *Id.* 193a-194a. (§ 1039 provides that if the number of congressional representatives is decreased and the next election is held "before the districts shall have changed to conform to the new apportionment," representatives shall be chosen at-large).

According to the letter, "*[the] sixty-day review period will begin when we receive the information specified above*, but we will make all efforts to expedite our review to the extent possible." *Id.* 196a (emphasis added). In addition, the letter stated:

> With respect to the actual congressional redistricting plan submitted by the state, we have concerns about the Department reviewing it while the plan . . . is pending final approval by the Mississippi Supreme Court on direct appeal. In that regard, please see the attached letter to the Chief Justice of that Court, sent this date.

Id. 195a.

The last reference was to an unusual letter sent that same

day from the Assistant Attorney General, Civil Rights Division, to the Chief Justice of the Supreme Court of Mississippi. J.S. App. 197a. The letter referred to the state court plan that had been submitted for preclearance and stated: "[T]hat plan, *pursuant to an order of your honorable Court*, was originally drafted by the Chancery Court of . . . Hinds County after trial and is now pending before your Court on direct appeal." *Id.* (emphasis added). The letter then stated: "I write to request respectfully that the Mississippi Supreme Court consider expediting its review of the appeal before it to the extent possible." *Id.* 198a. This request was made even though the United States government is not a party to the state court case, and even though the appellants in that case have not sought from the Mississippi Supreme Court either expedited review or a stay of the Chancery Court plan.

On February 19, the Attorney General of Mississippi submitted a comprehensive response to the Department's February 14 request for more information. J.S. App. 200a.

Also on February 19, the Federal District Court issued an opinion stating:

> [I]f the Chancery Court plan has not been precleared before the close of business on Monday, February 25, 2002, the congressional redistricting plan attached to our order of February 4, 2002, shall operate as the plan for congressional districts for the State of Mississippi for the 2002 congressional elections . . . .

J.S. App. 61a.

In that opinion, the federal court held that no deference was required because "as of this date, no part of the [state court] plan . . . has been approved by the Attorney General," and because the state court plan, "having been drafted by the Intervenors (plaintiffs in Chancery Court), not by the Chancery Court, and not by the Mississippi Legislature," is "no expression, certainly no clear expression, of state policy on

congressional redistricting to which we must defer." J.S. App. 31a-32a. The federal court agreed with the DOJ that its request for information started the sixty day review period anew. *Id.* 26a n.1, 33a-34a n.3. The Court also indicated that even if preclearance is granted, it might enjoin the state court plan and implement its own because of the "serious constitutional issue" of whether Article I, § 4 of the United States Constitution prevents the Mississippi courts from adopting congressional redistricting plans even when the legislature defaults. *Id.* 60a n.7.

Although the DOJ pledged on February 14 "to expedite our review to the extent possible," J.S. App. 196a, nothing more was heard from its officials. Monday, February 25, was the first weekday following the sixtieth day after the state court plan had been submitted. It passed uneventfully. On the morning of February 26, the Federal District Court enjoined implementation of the state court plan. J.S. App.1a. This was based not only on the absence of preclearance, but also "for the reason that [the plan] violates Article I, Section 4 of the United States Constitution." *Id.* 5a. According to the District Court, a state court cannot adopt a remedial congressional redistricting plan, even where the legislature defaults, unless "some act of the legislature" provides that the state court may do so. *Id.* 7a. The general grant of equitable authority to the courts under state law is not enough, said the District Court. *Id.* 20a. It thus concluded: "[I]rrespective of whether the chancery court plan is precleared, [it] cannot be implemented by the State of Mississippi because . . . the adoption of it . . . violates Article I, Section 4." *Id.* 22a. The Court's injunction required that its own plan be used in the 2002 congressional elections and "all succeeding congressional . . . elections . . . until the State of Mississippi produces a constitutional congressional redistricting plan that is precleared in accordance with the procedures in Section 5 of the Voting Rights Act of 1965." *Id.* 2a.

Shortly thereafter on the same day, February 26, the

appellants noticed the present appeal. J.S. App. 239a. The prior week, on February 20, they had lodged with this Court an application for stay and injunction pending appeal that formally was filed after the District Court's February 26 injunction. Later that same day, February 26, Justice Scalia denied the application. It was resubmitted to Justice Souter, who referred it to the full Court, which denied it on March 1, 2002. The candidate qualifying deadline expired the same day.

No decision has since been made regarding preclearance. The only further communication from the DOJ came in a letter to the Mississippi Attorney General dated April 1, 2002. In that letter, the Chief of the Voting Section of the Civil Rights Division acknowledged that the additional information was received on February 19-20. However, the letter stated that, in light of the District Court's Article I, § 4 holding, "it would be inappropriate for the Attorney General to make a determination concerning [the] submission now." The letter said: "Where voting changes submitted by the State have been enjoined by a federal court, they are not presently capable of administration, and are not ripe for review by the Attorney General." The letters added that "[i]f the injunction against implementation of these changes is lifted, . . . the Attorney General will again consider these changes for preclearance." Joint Appendix (J.A.) 29.

The renewed sixty-day period, which began on February 20, expired at 5:00 PM on April 22, the Monday after the sixtieth day. On April 23, the Branch intervenors (appellants here) filed in the District Court a motion to declare that the state court plan is now precleared under Section 5, pointing out that the statute provides for preclearance "if . . . the Attorney General has not interposed an objection within sixty days after . . . submission" of the voting change. J.A. 29. While the District Court had earlier rejected the appellants' claim that the plan was precleared by passage of the first sixty day period, the April 23rd motion asserted that the plan unquestionably was

precleared after the second sixty days. The motion contended that the District Court's Article I, § 4 holding does not postpone the statutory period, particularly since Section 5 triggers the period whenever a state "enact[s] or seek[s] to administer" a voting change and submits it for preclearance. The District Court denied the motion without explanation in a one-sentence order. J.A. 37.

This Court noted probable jurisdiction of this appeal on June 10, 2002. It also noted probable jurisdiction that day of a conditional cross-appeal filed by the MREC and the Smith federal plaintiffs contending that the District Court should have imposed at-large congressional elections rather than a districting plan.[6]

SUMMARY OF ARGUMENT

In *Growe v. Emison*, 507 U.S. 25, 33 (1993), this Court unanimously held that both legislative and congressional redistricting are governed by the longstanding principle that "state courts have a significant role in redistricting." In conformity with that principle, the state courts of Mississippi confronted the problem, previously unseen in that state in the years after *Baker v. Carr*, 369 U.S. 186 (1962), of a total

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[6] Just as in the District Court trial, the state defendants have played no role in the appeal to this Court. The MDEC has filed a letter with the Clerk of this Court saying it supports the position of the appellants. The MREC and the Smith federal plaintiffs are the only appellees opposing this appeal. Unless otherwise stated, any references in this brief to the "appellees" are to the MREC and the Smith federal plaintiffs.

The appeal filed in the Supreme Court of Mississippi by the MREC and the Mauldin state court intervenors is in the midst of briefing. No matter how that appeal is resolved, the Art. I, § 4 issue will remain alive. The Federal District Court's Art. I, § 4 injunction prevents the state courts from implementing *any* plan, whether it is the existing state court plan or some alternative that those courts adopt in the future if the existing plan is vacated on appeal.

legislative failure to redraw congressional districts after a census. The Chancery Court adopted a plan that was submitted for preclearance over sixty days prior to the qualifying deadline. None of the parties sought a stay from the Mississippi Supreme Court. Instead, the Federal District Court displaced the plan with an unprecedented interpretation of Article I, § 4 and an unwarranted extension of the statutory sixty-day deadline provided by Section 5, thus allowing the Department of Justice to delay a preclearance decision past the March 1 qualifying deadline so that the federal court plan could be used in the current year's election. The Department continues to ignore the statutory deadline by postponing the second sixty day period and declining to make a decision on preclearance unless and until this Court reverses the District Court's constitutional holding.

1. Article I, § 4 does not deprive state courts of the authority to hear congressional redistricting cases pursuant to their general equitable jurisdiction.

A. If the District Court decision is affirmed, *Growe* will be overruled and the courts of most states will be unable to play any role in congressional redistricting. Minnesota, the state at issue in *Growe*, is like most other states. It has no specific jurisdictional statute regarding congressional redistricting and its courts handle such cases pursuant to their general equitable jurisdiction. The District Court's holding, if affirmed, would take this authority away from Minnesota and the vast majority of the other states. Nothing in Art. I, § 4 requires such a stark alteration of the federal-state landscape in situations where courts are called upon to enforce the law in matters of congressional redistricting

B. Although the legislatures possess authority under Art. I, § 4, to prescribe the "Manner of Holding Elections for . . . Representatives," the Mississippi state courts did not take this authority from the legislature. Instead, the legislature failed to

adopt a new plan even though one clearly was required by both state and federal law. While the Mississippi courts filled the breach by adopting a plan, the legislature remains free to assert its will and prescribe its own plan, which will supersede that of the courts.

C. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), this Court confirmed that Art. I, § 4 does not prevent courts from enforcing federal law in matters of congressional redistricting. Since federal courts are not the exclusive guardians of the federal law, it is clear that state courts also may enforce federal law in such cases.

D. The appellees' primary argument seems to be that even if state courts can enforce federal law in congressional redistricting cases, the state court complaint here cited no federal law provisions. But this ignores the fact that state courts are required to enforce federal law even when a complaint raises only state law claims, and that state courts always are required to enforce federal law and cure federal violations when designing a congressional redistricting plan in the wake of a post-census legislative default. Nothing about the word "Legislature" in Art. I, § 4 suggests that a state court is precluded from implementing a new congressional districting plan and curing a clear violation of both federal and state law simply because the complaint raises only state law claims.

E. This Court's decisions in *Davis v. Hildebrant*, 241 U.S. 565 (1916), and *Smiley v. Holm*, 285 U.S. 355 (1932), confirm that Art. I, § 4 does *not* "render[] inapplicable the conditions which attach to the making of state laws." *Smiley*, 285 U.S. at 365. In Mississippi, as in most states, the "conditions which attach to the making of state laws" include the power of the courts to take the necessary steps to enforce the laws through equitable relief when, as here, the legislature leaves a gap.

2. Because, in the words of Section 5, "the Attorney General has not interposed an objection within sixty days" of

either the original submission of the state court plan or the response providing the additional information requested by the DOJ, the plan is precleared by operation of the statute.

A. At the very latest, the Attorney General was required to object to the plan within sixty days after the additional information was submitted if he believed the plan to discriminate in violation of Section 5's substantive standards. The federal court's constitutional injunction does not make any difference. The sixty day period is triggered by Section 5 whenever a state "enact[s] or seek[s] to administer" a voting change and "submit[s] [it] . . . to the Attorney General." Even under the DOJ theory that the submission of the plan was not complete until the additional information was provided on February 19, the sixty days started anew then. Although the subsequent constitutional injunction might prohibit state officials from implementing the plan, its presence does not alter the fact that the state has "enact[ed] or seek[s] to administer" the plan. The language of Section 5 does not allow the Attorney General unilaterally to postpone the sixty day period because of a constitutional injunction.

B. Since the Department sought no additional information regarding the state court plan itself, there was no basis to postpone the initial sixty day period. The decision of the Mississippi Supreme Court in *In Re Mauldin* authorizing the Chancery Court to adopt a plan is not itself a voting change that requires preclearance. Similarly, the state courts' decision to implement a districting plan prior to the election is not a change from the Mississippi statute requiring at-large elections only in those situations where the districts cannot be drawn prior to the election. Moreover, even if these are voting changes, the additional information requested by the DOJ was unnecessary and irrelevant to the Section 5 evaluation. The Attorney General can postpone the sixty day period only if the initial information provided is so insufficient that the plan cannot be deemed to have been "submitted" under Section 5. Clearly that

was not the case here.

I. ARTICLE I, § 4 DOES NOT DEPRIVE STATE COURTS OF POWER TO HEAR CONGRESSIONAL REDISTRICTING CASES IN THE EXERCISE OF THEIR GENERAL EQUITABLE JURISDICTION.

A. The District Court's Decision, If Affirmed, Would Overrule *Growe v. Emison* and Preclude the Courts of Most States from Playing Any Role in Congressional Redistricting, Even When Legislatures Default.

In *Growe v. Emison,* which involved both legislative and congressional apportionment, this Court said: "The power of the judiciary of a State to require valid reapportionment or to require a valid redistricting plan has not only been recognized by this Court, but . . . has been specifically encouraged." 507 U.S. at 33, *quoting, Scott v. Germano*, 381 U.S. 407, 409 (1965). Moreover, "federal judges [must] defer consideration of disputes involving redistricting where the State, through it's legislative *or* judicial branch, has begun to address that highly political task itself." *Growe*, 507 U.S. at 33.

Despite the unanimous holding in *Growe* applying this principle to congressional redistricting, the District Court here held that, in light of Article I, § 4, the courts of Mississippi and all other states are powerless to adopt a congressional plan in the wake of a legislative default unless an "enactment of the . . . legislature grants to the . . . court the power to redistrict . . . for congressional elections. " J.S. App. 7a. State law provisions giving the courts general jurisdiction to enforce the law through equitable relief are insufficient, said the District Court. *Id.* 20a.

By holding that the state court plan violates Article I, § 4, the District Court concluded either that this Court was heedless of that provision when it unanimously decided *Growe* as it did or that it silently hinged its decision on two particular Minnesota statutes that never were mentioned in the opinion. The District Court distinguished *Growe* on the grounds that

"Article I, Section 4 was not raised in *Growe* . . . and . . . there was some, albeit tenuous, legislative authority for the Minnesota Supreme Court's action in *Growe*." J.S. App. 18a. That "legislative authority" involved two Minnesota statutes dealing not with the role of state courts in redistricting, but with the authority of the Chief Justice of the state to "assign any judge of any court to serve . . . in a judicial district not that judge's own," and "to direct any judge . . . to hold court in any county or district where need therefor exists." J.S. App. 16a n.8, *quoting*, Minn. Stat. §§ 2.724 and 480.16. The statutes are general in their scope and do not refer to any particular type of case, redistricting or otherwise. They were never mentioned in *Growe*, but instead in a Minnesota Supreme Court opinion eight years later discussing the Minnesota Chief Justice's authority to appoint a special redistricting panel of three judges to hear the case (which is also what happened in the state court case that formed the backdrop of *Growe*). J.S. App. 16a, *citing, Cotlow v. Growe*, 622 N.W.2d 561, 562 (Minn. 2001). The District Court here never explained how these statutes would meet its requirement of an "enactment of the . . . legislature grant[ing] the . . . court the power to redistrict . . . for congressional elections. " J.S. App. 7a.[7]

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[7] Indeed, Mississippi has a similar statute allowing the Chief Justice to assign judges throughout the state. Miss Code Ann. § 9-1-105(2), (6). Stretching to justify its reasoning and read the case law consistently with its unprecedented decision, the District Court explained two California state court congressional redistricting cases in the following manner: "In both cases, the California Supreme Court acted under its original mandate jurisdiction, as granted to the court in the state constitution, which of course provides a source of law for the state. *See* Cal. Const. Art. VI, § 10." J.S. App. 14a, n.7. But Cal. Const. Art. VI, § 10 has nothing to do with redistricting. Instead, it addresses only the original jurisdiction of the various levels of courts in California. As with the Minnesota statutes, the District Court cited this California provision in support of its ruling without acknowledging that the provision says nothing about what the District Court called "the power to redistrict . . . for congressional elections." J.S. App. 7a.

Clearly, if the District Court's decision is affirmed, *Growe v. Emison* will be overruled. Minnesota itself does not satisfy the District Court's Art. I, § 4 formula. Moreover, Minnesota is not alone in containing no state statute or constitutional provision that speaks specifically of state court jurisdiction in congressional redistricting cases. Very few states have them.[8] Yet state courts, particularly in the wake of *Growe*, quite properly exercise jurisdiction over such cases.

In the present redistricting cycle, courts of a number of states stepped in when legislatures defaulted and assumed jurisdiction in congressional redistricting cases without citing any state statutes that speak to it. *See e.g. Alexander v. Taylor*, 2002 WL 1370034 (Okla. June 25, 2002) (affirming adoption of plan and specifically rejecting the reasoning of the District Court in the present case); *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002) (affirming adoption of plan); *Perry v. Del Rio*, 67 S.W.3d 85 (Tex. 2001); *Cotlow v. Growe*, 622 N.W.2d at 563-64; *Zachman v. Kiffmeyer,* No. C0-01-160 (Minn. Special Redist. Panel, Mar. 19, 2002) (adopting plan); *Jepsen v. Vigil-Giron*, No. D0101-CV-2002-02177 (Dist. Ct. of Santa Fe Cty., N.M., Jan. 2, 2002) (adopting plan); *Perrin v. Kitzhaber*, No. 0107-07021 (Cir. Ct. of Multnomah Cty., Oregon, Oct. 19, 2001) (adopting plan).

Affirmance of the District Court's decision not only will overrule *Growe*, but will leave courts of the vast majority of the states devoid of any authority to hear congressional redistricting cases and adopt congressional redistricting plans, even when legislatures fail to act. The field will be left almost entirely to the federal courts. As explained in the remainder of this section, nothing about Art. I, § 4 requires this dramatic

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[8] We are aware of only six: Conn. Const. Art. 3, § 6; Me. Rev. Stat. Ann. tit. 21-A, § 1206; Mass. Gen. Laws Ann. ch. 56, § 59; Mich. Comp. Laws Ann. § 3.71; N.J. Const. Art. 2, § 2, P7; Wash. Const. Art. 2, § 43.

alteration of the relationship between state and federal courts in matters of congressional redistricting.

B. The Action of the State Courts in this Case Did Not in Any Way Deprive the Legislature of its Power to Prescribe the Manner of Electing Members of Congress.

Art. I, § 4 provides that "[t]he Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof." But the Mississippi legislature chose not to prescribe the shape of the districts. Someone had to do it. Nothing in Art. I, § 4 forbids the state courts from enforcing the law and adopting a plan so that elections can go forward in this difficult situation.

Having lost no power, of course, the legislature remains free to assert its will, prescribe the shape of the districts, and supersede the state court plan. The Supreme Court of Mississippi's December 13 order specifically held that any chancery court plan "will remain in effect, *subject to* any congressional redistricting plan which may be timely adopted by the legislature." J.S. App. 111a (emphasis added).

This case is unlike *Bush v. Gore*, 531 U.S. 110 (2000), where three justices of this Court concluded in concurrence that the Florida Supreme Court's ruling infringed upon the legislature's decision regarding the standards for choosing presidential electors, thus transgressing Article II, § 1's command that each state appoint its electors "in such Manner as the Legislature thereof may direct." *Id.* at 111 (Rehnquist, C.J., concurring). Contrary to that situation, no one here contended that the pre-existing legislative scheme — in this case, the prior congressional districting plan — could be utilized. It had too many districts and obviously violated what the Mississippi Supreme Court has described as "the one person, one vote standard under the 14th Amendment of the United States Constitution as well as under Miss. Const. Art. 3,

§ 14." *Adams County Election Commission v. Sanders*, 586 So. 2d 829, 831 (Miss. 1991). Moreover, as just mentioned, the legislative will here was not thwarted. The legislature retains the prerogative of superseding the state court's decision by enacting its own plan. This is not a case where the state courts cast aside "the clearly expressed intent of the legislature." *Bush v. Gore*, 531 U.S. at 120 (Rehnquist, C.J., concurring).

C. If, as this Court Has Held, Art. I, § 4 Does Not Prevent Federal Courts from Enforcing Federal Law in Congressional Redistricting Cases, Surely it Does Not Preclude State Courts from Doing the Same.

This Court already has held that the reference in Art. I, §4 to the power of "Congress . . . at any time [to] make or alter such Regulations" for the manner of electing congressional representatives does not preclude courts from adjudicating congressional redistricting cases and enforcing the law. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court discussed Justice Frankfurter's opinion in *Colegrove v. Green*, 328 U.S. 549 (1946), and said:

> Mr. Justice Frankfurter's Colegrove opinion contended that Art. I, 4, of the Constitution had given Congress "exclusive authority" to protect the right of citizens to vote for Congressmen, but we made it clear in Baker that nothing in the language of that article gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury v. Madison*, 1 Cranch 137, in 1803. Cf. *Gibbons v. Ogden*, 9 Wheat. 1.

376 U.S. at 6-7 (footnotes omitted).

Surely, if the reference in Art. I, § 4 to the power of Congress does not immunize congressional redistricting from

judicial enforcement of the law, neither does the reference to legislatures. And while the District Court here held that Art. I, § 4 forbids court action unless a statute tells courts in specific terms that they can adjudicate congressional redistricting cases, *Wesberry* imposed no such a requirement. It relied on no such Congressional act and, indeed, none existed at the time.[9]

While the *Wesberry* opinion was referring to the enforcement of the federal constitution, federal courts are not the exclusive guardians of that constitution. State courts also are obligated to enforce it. *See, Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-44 (1816). When the Constitution was enacted, there were no lower federal courts. The task of judicial enforcement fell to the state courts. Any claim brought to enforce federal law in congressional elections would necessarily have been heard in state court. *See,* U.S. Const. art. III, § 1 (allowing but not requiring Congress to establish lower federal courts); Judiciary Act of 1789, 1 Stat. 73 (creating lower federal courts, but not conferring civil jurisdiction to hear federal questions); Judiciary Act of 1875, 18 Stat. 470 (conferring, for the first time, civil federal question jurisdiction on the lower federal courts). Clearly, Art. I, § 4 was not designed to preclude state courts from enforcing federal law in this arena.

The appellees do not seem to contest this point. Instead, they sidestep it by contending that the state court complaint here mentioned no provisions of federal law. They offer no explanation as to why this is relevant. Certainly, the District

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[9] 28 U.S.C. § 2284(a), which mandates a three-judge court when a federal case is filed challenging the constitutionality "of congressional districts," did not contain the language about congressional districts until 1976. 90 Stat. 1119. Prior to that time, the statute required three-judge courts whenever the constitutionality of a state statute was questioned, and there was no language in the statute about congressional redistricting. 74 Stat. 201; 62 Stat. 968.

Court's robust reading of Art. I, § 4 did not rest on this distinction. Indeed, perhaps recognizing the unsettling scope of the District Court's reasoning, the appellees did not try to defend it in responding to the Jurisdictional Statement. Instead, in their Motion to Affirm, they conceded that "[s]tate courts are obliged by the Supremacy Clause of Art. VI to enforce federal law. . . ." Mot. Aff. 18. *See also, id.* 22 ("federal claims may be litigated notwithstanding Art. I, § 4"). Had a federal claim been specifically included in the state court complaint, they imply, the District Court would have been wrong to enjoin the state court plan on constitutional grounds. But here, they say, there was no such claim. *Id.* As explained in the next subsection of this brief, however, the jurisdiction of the state courts does not turn on the presence or absence of a specific federal claim in the complaint.

D. The State Courts Are Not Deprived of Jurisdiction in Congressional Redistricting Cases Simply Because the State Court Complaint Does Not Specifically Mention Provisions of Federal Law.

In contending that the present case is different because federal claims were not specified in the complaint, the appellees ignore the fact that, to quote again their language from page 18 of the Motion to Affirm, "[s]tate courts are obliged by the Supremacy Clause of Art. VI to enforce federal law" even in cases where only state law claims are in the complaint. In *Hathorn v. Lovorn*, 457 U.S. 255, 258, 269-70 (1982), where the complaint raised only state law causes of action, this Court specifically held that the state courts have "the duty" to enforce federal law.

Any congressional redistricting plan adopted by a state court must, of necessity, comply with federal law, including the equal population requirement of Art. I, § 2, the specification of a particular number of representatives pursuant to the apportionment required by Art. I, § 2, the use of districts to

elect representatives pursuant to 2 U.S.C. § 2c, the equal protection clause of the Fourteenth Amendment, and the Voting Rights Act. Although the state court complaint here mentioned no specific provision of federal law, it asked the court "to insure enforcement of the laws" by adopting a plan in the wake of a legislative default. In this situation, as in most instances when state courts are called upon to adjudicate these matters, the pre-existing plan — designed prior to the last census — did not comply with either state or federal law. In Mississippi, it complied with neither the equal population requirement of Art. I, § 2 of the federal constitution nor what the Mississippi Supreme Court has described as "the one person, one vote standard . . . under Miss. Const. Art. 3, § 14." *Adams County Election Commission v. Sanders*, 586 So. 2d 829, 831 (Miss. 1991). Similarly, it did not comply with the new apportionment inasmuch as the state lost a seat, going from five to four. Thus, whether or not federal law claims were raised in the complaint, the state courts of Mississippi, in adopting a plan, were required to comply with federal law and cure a pre-existing federal law violation.

Elsewhere, the appellees have recognized that federal law was intrinsic to the state court case. In their brief to the Mississippi Supreme Court as part of their appeal there, the appellees quote the state court complaint and say:

> Plaintiffs' prayer that the Chancery Court should "issue an injunction adopting and directing the implementation of a congressional redistricting plan," C.P. 6, R.E. 10, necessarily implicates Article I, § 2 of the Constitution, which provides, "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."

Brief of [State Court] Appellants, *Mauldin v. Branch*, No.

2002-CA-00146 (Miss.), pp. 38-39.[10]

If, as the appellees seem to acknowledge, the Supremacy Clause of Art. VI gives state courts the power and the duty to enforce federal law and cure federal violations in a congressional redistricting case where federal claims are raised in the complaint, surely those courts also may enforce state law and cure state law violations in such a case (as long as state law does not run afoul of federal law). If state courts can cure both federal and state law violations when federal claims are raised in the complaint, it follows that they also can do so when only state law claims are raised in the complaint. Nothing about the word "Legislature" in Art. I, § 4 suggests that a state court is precluded from implementing a new congressional districting plan and curing a clear violation of both federal and state law simply because the complaint only raises state law claims.

A different scenario would be presented if the legislature had adopted a plan that complied with federal law, and the state court cast aside the plan on the sole ground that it violated state law. Whether that would make a difference for purposes of Art. I, § 4 need not be resolved since that did not happen here.[11] Instead, the Mississippi legislature failed to adopt a new plan even though one was required by both federal and state law. The action of the Mississippi courts in curing the resulting

[10] A copy of this state supreme court brief will be lodged with the Clerk of this Court.

[11] The cases discussed later in this brief, *Davis v. Hildebrant*, 241 U.S. 565 (1916),and *Smiley v. Holm*, 285 U.S. 355 (1932), suggest that Art. I, § 4 would not prevent the state courts from acting in such a situation. *See also, Preisler v. Hearnes*, 362 S.W. 2d 552, 555 (Mo. 1962) (implying a general equitable power to strike down congressional districts that do not comply with state constitutional requirements); *Brown v. Saunders*, 166 S.E. 105 (Va. 1932) (nullifying a congressional apportionment on state constitutional grounds).

federal and state law violations did not violate Art. I, § 4.[12]

E. Contrary to the District Court's Analysis, this Court's Precedents Actually Support the Exercise of State Court Jurisdiction and Demonstrate That Article I, § 4 Does Not Preclude It.

In canvassing the precedents, the District Court here found only three cases interpreting the relevant clause of Article I, § 4, two from this Court and one from a three-judge federal district court: *Davis v. Hildebrant*, 241 U.S. 565 (1916) (nullification of the legislature's congressional redistricting plan by application of a state constitutional provision allowing the people to disapprove any law through popular referendum does not violate Article I, § 4); *Smiley v. Holm*, 285 U.S. 355 (1932) (governor's veto of legislature's congressional redistricting plan does not violate Article I, § 4); and *Grills v. Branigin*, 284 F. Supp. 176, 178 (S.D. Ind.), *aff'd*, 391 U.S. 364 (1968) (Article I, § 4 does not permit a state board of elections to draw a congressional redistricting plan to displace that of the legislature). According to the District Court, "these three cases . . . have made clear that the reference to 'Legislature' in Article I, Section 4 is to the law-making body and *processes of the state*." J.S. App. 13a (emphasis added).

This supports the exercise of state court authority rather than contradicts it. In most states, including Mississippi, the "processes of the state"authorize the courts to enforce the law through equitable remedies. Just as this Court held in *Davis*

[12] This comports with the suggestion in *Growe* that the precise nature of the claims in the complaint does not matter. In ordering federal courts to defer to state courts in these matters, this Court in *Growe* said: "*Germano* . . . does not require that the federal and state-court complaints be identical; it instead *focuses on the nature of the relief being requested*: reapportionment of election districts." 507 U.S. at 35 (emphasis added), *citing, Scott v. Germano*.

that the application of the state constitutional authority of the people of Ohio to nullify a legislative enactment did not countermand Art. I, § 4 when congressional redistricting was at issue, the application of the state constitutional and statutory authority of Mississippi's chancery courts over all matters in equity, Miss. Const. Art. 6, § 159, Miss. Code Ann. § 9-5-81, does not violate Art. I, § 4 in such a situation. And just as this Court held in *Smiley* that the gubernatorial veto generally applicable to legislative enactments can be exercised with respect to congressional redistricting without violating Art. I, § 4, so the equitable authority of courts to enforce the law as a general matter can be exercised in that arena without transgressing that provision. Indeed, in *Smiley*, this Court said that Art. I, § 4 does *not* "render[] inapplicable the conditions which attach to the making of state laws" such as, in that instance, the gubernatorial veto. 285 U.S. at 365. In Mississippi, as in most states, the "conditions which attach to the making of state laws" include the power of the courts to take the necessary steps to enforce the laws through equitable relief when, as here, the legislature leaves a gap.[13]

If anything, the situations in *Davis* and *Smiley* would be more likely to contravene Art. I, § 4 than what happened here. In those cases, a non-legislative entity nullified the legislature's congressional plan. Here, the state courts acted only when the legislature declined to act. Surely, if Art. I, § 4 was not transgressed there, it was not violated here.

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[13] In *Grills*, when holding that the state election board could not draw congressional plans, the federal district court said that the board does not "possess the legislative power . . . nor . . . judicial power under the Indiana constitution," 284 F. Supp. at 180. This reference to judicial power implies that the state courts can exercise equitable authority and draw such plans without violating Art. I, § 4.

II. THE STATUTORY SIXTY DAY DEADLINE PRESCRIBED BY SECTION 5 HAS PASSED TWICE WITHOUT AN OBJECTION BY THE ATTORNEY GENERAL, AND BY VIRTUE OF EITHER OR BOTH OF THOSE PASSAGES, THE STATE COURT PLAN HAS BEEN PRECLEARED.

As noted later in this brief, we contend the state court plan was precleared by operation of the statute as of February 26, 2002 at the conclusion of the first sixty days. But the District Court chose to hold otherwise. This Court declined to enter a stay and the federal court plan is being used for the 2002 elections. The question now before the Court is whether the state court plan is precleared as of the present time so that it can be used in future elections. At the very latest, the Attorney General had until 5:00 PM on April 22, the first Monday after the sixtieth day after the February 19-20 submission of the additional information, to object if he believed the state court plan to discriminate in violation of Section 5's substantive standards. If we are correct about that, there is no need to resolve our separate assertion that the Attorney General actually had only sixty days from the original submission to object. Either way, the plan has been precleared.

A. Although the Federal Court Enjoined the Plan on Constitutional as Well as Section 5 Grounds, the Constitutional Injunction Did Not Change the Fact That the State Had "Enact[ed] or [Sought] to Administer" the Plan, and Thus the Attorney General Had No Right to Extend the Second Sixty Day Statutory Period.

Section 5 provides that when any covered state "enact[s] or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it may obtain federal preclearance "if the qualification,

prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . ." The State of Mississippi, whose courts have ordered implementation of the state court plan, clearly has "enact[ed] or seek[s] to administer"that plan. This is reflected in the Mississippi Supreme Court's December 13, 2001 ruling and the December 21 opinion and order of the Chancery Court of Hinds County. The Federal District Court's constitutional injunction does not change this fact.

Although the April 1 Department of Justice letter stated that the plan is not "presently capable of administration" because of the District Court's constitutional injunction, Section 5 does not require that the plan be "capable of administration." It simply requires that the state authorities "enact or seek to administer" the plan. Once the plan is submitted, the statutory sixty day review period begins. Nothing in the statute allows the Attorney General to postpone the sixty day period simply because a federal court enjoins the plan on federal constitutional grounds.

Not only is there nothing in the statutory language to support this subversion of the sixty day requirement, but the DOJ has adopted no regulation authorizing it. Instead, the Department has trotted out this unsupported justification as a means of continuing to delay the preclearance process and preventing implementation of the state court plan for as long as possible without saying whether it satisfies Section 5's substantive requirements. This is particularly unfortunate given that the plan, which contains a 59% BVAP district, clearly is not retrogressive and does not violate Section 5. *See* n. 2 of this brief; J.S. App. 45a (federal court opinion stating that the 59.2% BVAP federal district is not retrogressive).

In *Morris v. Gressette*, 432 U.S. 491 (1977), this Court

explained that under Section 5, a covered jurisdiction may preclear a voting change by obtaining a declaratory judgment from the Federal District Court for the District of Columbia or, alternatively, "may submit [the] change . . . to the Attorney General and subsequently may enforce the change if 'the Attorney General has not interposed an objection within sixty days after such submission.'" *Id.* at 502. Under this alternative method, said the Court, "compliance with § 5 is measured solely by the absence, *for whatever reason*, of a timely objection on the part of the Attorney General." *Id* (emphasis added). The Court added:

> We think it clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. The congressional intent is plain: The extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission. Although there was to be no bar to subsequent constitutional challenges to the implemented legislation, there also was to be "no dragging out" of the extraordinary federal remedy beyond the period specified in the statute.

Id. at 504. Also, the Court pointed out that "the Attorney General's failure to object is not conclusive with respect to the constitutionality of the submitted state legislation." *Id.* at 505.

Thus, this Court recognized that federal courts might enjoin voting changes on constitutional grounds independent of any Section 5 review. At the same time, the Court said review by the Attorney General must provide an "expeditious" means of preclearance and may not be "'dragg[ed] out' . . . beyond the period specified in the statute." This strongly corroborates what is clear from the statutory language: a constitutional injunction does not postpone the statutory sixty day review

period.

The need for a prompt decision on a Section 5 submission, independent of any constitutional injunction, is illustrated by the fact that "States must often redistrict in the most exigent circumstances." *Growe v. Emison*, 507 U.S. 25, 35 (1993). If a federal court enjoins a redistricting plan on constitutional grounds, the injunction is subject to being vacated on appeal, perhaps through emergency review. However, if the Attorney General can postpone the sixty day period when an injunction is entered, the covered jurisdiction will be unable to implement the plan promptly even if the injunction is vacated. The jurisdiction will be required to await renewal and completion of the interrupted Section 5 review process. The language of Section 5 does not allow for this sort of delay.

Of course, if the Attorney General is unable — as we contend — to postpone the sixty day period, there is the possibility that the completion of the Section 5 review process will have been in vain if the constitutional injunction is not lifted on appeal. But had Congress believed this a serious problem, it could have written the statute to stop the sixty day period when an independent injunction was issued. It did not do so, and the statutory terms of Section 5 do not allow for extension of the review period on this basis. The state court plan has been precleared by operation of the statute.

B. Because the Department of Justice Never Sought Additional Information Regarding the State Court Plan Itself, There Was No Basis to Postpone the First Sixty Day Period.

The December 26, 2001 preclearance submission listed three separate items for possible preclearance: (1) the December 21, 2001 Chancery Court order substantively adopting a new congressional redistricting plan, (2) the December 13 Mississippi Supreme Court ruling in *In Re Mauldin* that the chancery court had jurisdiction to hear the

case and adopt a plan, and (3) the December 21 Chancery Court order "to the extent that it constitutes a departure from Miss. Code Ann. Section 23-15-1039." J.S. App. 227a-229a.[14]

The February 14 Department of Justice letter did not seek more information regarding the first change. "[T]he Department is not formally seeking additional information regarding the redistricting plan." J.S. App. 195a. Most of the questions related to the second item. One question purportedly related to the third, which involves Miss. Code Ann. § 23-15-1039, a statute providing that if the number of congressional representatives is decreased and the next election is held "before the districts shall have changed to conform to the new apportionment," representatives shall be chosen at-large. Although acknowledging that the DOJ "has not sought additional information regarding the redistricting plan," the District Court nevertheless extended the sixty day statutory review period because, it said, the latter two items involve a "newly asserted change in redistricting authority" that, if not precleared, "render[] the plan itself a legal nullity under the Voting Rights Act." *Id.* 33a-34a n.3.

In the remainder of this brief, we contend (a) the December 13 state supreme court ruling is not a voting change, (b) the December 13 Supreme Court order and December 21 Chancery Court order do not conflict with § 23-15-1039 and

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[14] After listing the first item submitted, which was the Chancery Court's "substantive[] adopt[ion of] a new congressional redistricting plan," the Mississippi Attorney General's office submitted the other two by listing "the following additional matters which *may* constitute a covered change . . . ." J.S. App. 227a (emphasis added). The submission also expressly reserved all objections as to whether the submission, "or any parts thereof," are subject to Section 5's preclearance requirements. *Id.* 225a. Also, contrary to the suggestion of the District Court, J.S. App. 97a-98a, the appellants did not concede that anything other than the first of the three items listed above is a voting change subject to Section 5.

therefore do not alter the provisions or operation of that statute in a way that constitutes a voting change, and (c) even if one or both of the foregoing are voting changes, the information requested by DOJ on February 14 is unnecessary and irrelevant to the § 5 retrogression evaluation. If we are correct about points (a) and (b), the additional information requested does not relate to any voting changes, and the voting change that did occur — the redrawing of the lines — was precleared when the sixtieth day expired on February 25 without objection. If we are correct about point (c), it raises the question left open in *Georgia v. United States*, 411 U.S. 526 (1973) — whether a request for additional information that is "unnecessary or irrelevant to § 5 evaluation of the submitted reapportionment plan," *id.* at 540, extends the review period beyond the statutory sixty days. If, as we contend, this sort of unnecessary information does not extend the statutory period, the state court plan has been precleared.

1. **The December 13 Order of the Mississippi Supreme Court in *In Re Mauldin* Is Not a Voting Change.**

The December 13 Mississippi Supreme Court's order in *In Re Maudlin* confirming the Chancery Court's jurisdiction does not involve (to quote Section 5) the "enact[ment] or . . . administ[ration] [of] any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964."

In *Hathorn v. Lovorn*, 457 U.S. 255, 269-70 (1982), while reviewing a Mississippi chancery court order implementing a new election scheme, this Court held that state courts must enforce Section 5 and insure preclearance of any voting changes they mandate. But the Court never suggested that preclearance also was required of the decision by the state courts to exercise jurisdiction in the first place.

In contending the December 13 decision constitutes a

voting change, the District Court, J.S. App. 96a-97a, cited a 1932 Mississippi Supreme Court decision declining to adjudicate a congressional redistricting claim and saying, "courts of equity deal alone with civil and property rights and not with political rights." *Brumfield v. Brock*, 142 So. 745, 746 (Miss. 1932). That case, like *Barnes v. Barnett*, 129 So. 2d 638, 641 (Miss. 1961), arose at a time when the "almost universal rule [was] that the apportionment . . . of congressional districts is a political question and not a judicial one." *Barnes*, 129 So. 2d at 641. As the Court said in *Barnes*, "the leading case so holding is *Colegrove v. Green*, 1946, 328 U.S. 549." 129 So. 2d at 641. But subsequent to *Barnes*, this Court overruled *Colegrove v. Green* in the landmark decision of *Baker v. Carr*, 369 U.S. 186 (1962). Afterwards, state courts in Mississippi, like courts throughout the land, began hearing redistricting cases involving all types of elected bodies. *See, e.g., Hathorn v. Lovorn*; *Carter v. Luke*, 399 So. 2d 1356 (Miss. 1981); *Brooks v. Hobbie*, 631 So. 2d 883, 885-86 (Ala. 1993) (overruling pre-*Baker* Alabama precedent and stating: "In light of *Baker v. Carr* and its progeny, it is not longer legitimate for a court to decline to enforce the right of every citizen to [an equal] vote"). But no one suggested that preclearance was required of the mere decision to exercise jurisdiction.

If that sort of decision is a voting change, a number of post-1964 ventures by state courts into the arena of voting rights in covered jurisdictions have violated Section 5. And the violations are ongoing. For example, prior to *Reynolds v. Sims*, 377 U.S. 533 (1964), the Fourteenth Amendment was widely considered not to require population equality among state legislative and local governmental districts and few, if any, state courts required it. And prior to 1965, the Voting Rights Act did not exist. After these developments, of course, state courts began to uphold the one-person, one-vote rule and the Voting Rights Act in a variety of contexts. We are aware of no courts, however, that believed they had to obtain preclearance

of the threshold decisions to hear the cases (as opposed to the actual changes ordered at the conclusion of the cases) and are aware of none that have done so.

But under the theory of the District Court here, preclearance was required before any of those state courts could apply these new principles of law and exercise jurisdiction over any type of claim they had not adjudicated prior to the trigger date for Section 5 (which is November 1, 1964 in a number of states). According to that theory, if a trial court exercises jurisdiction post-1964 in a one-person, one-vote case involving a county commission, in a situation where it has never done so before, it first must obtain preclearance of that exercise — independent of obtaining preclearance for any new election plan it adopts. Once the case goes on appeal, the state supreme court must obtain preclearance of any decision affirming the trial court's jurisdiction if it previously has not done so in an identical or at least similar situation. Apparently, the entire process must be repeated the next time a case arises in a slightly different context — say, city council elections rather than county commission elections. Indeed, under the District Court's holding, the preclearance path must be traversed anew every time the state courts, acting in conformity with developments in the jurisprudence of voting rights, hear a case in a new context.[15]

Of course, as a general matter, voting changes may not be implemented until precleared. *Clark v. Roemer*, 500 U.S. 646, 652 (1991). If the assumption of jurisdiction in a new context is a voting change, a state court may believe it is required to submit the change to the DOJ, wait sixty days, wait another

[15] For example, under the District Court's theory, a state court, confronting for the first time a case involving what this Court in *Shaw v. Reno*, 509 U.S. 630, 652 (1993) described as the "analytically distinct" claim raised there, would be required to obtain preclearance of the assumption of jurisdiction in such a case.

sixty days if the DOJ chooses to delay and ask the type of questions it asked here, and obtain DOJ approval before it even holds hearings or goes forward in the case. That sort of delay, is problematic in any case, but particularly in voting rights litigation, which often involves what this Court in *Growe* described as "exigent circumstances." 507 U.S. at 35. Surely, Section 5 does not mandate such a cumbersome process.

If it did, the landscape would be littered with violations. As mentioned before, few state courts have obtained this sort of preclearance. Under the District Court's holding, any remedies those courts ordered are unlawful because, even though the changes encompassed by the remedies were precleared, the underlying assumptions of jurisdiction were not.

Like most courts in most states, chancery courts in Mississippi long have held equitable authority. They have applied that authority in voting cases after *Baker v. Carr* to a greater degree than before. While any particular remedial order in such a case that changes the method of voting must be precleared, the mere decision to assume jurisdiction in the post-*Baker v. Carr* context is not a voting change. The December 13 ruling of the Supreme Court of Mississippi is not subject to Section 5 and preclearance is not required.

2. The Use of Districts Rather than At-large Elections in the State Court Plan Does Not Deviate from Miss. Code Ann. § 23-15-1039 and Is Not a Voting Change.

In addition to the numerous questions regarding chancery courts in Mississippi, the February 14 DOJ letter contains one question regarding the relationship between the state court's exercise of jurisdiction and Miss. Code Ann. § 23-15-1039. J.S. App. 193a-194a.[16] The District Court also intimated that

[16] After referring to the December 13 order, the letter said: "Please explain the state's view of the relationship between this change in procedure and Miss. Code Annot. 23-15-1039." J.S. App. 193a-194a.

the December 13 order constituted a voting change from the formula contained in Miss. Code Ann. § 23-15-1039. J.S. App. 96a-98a. But neither the state court plan nor the exercise of state court jurisdiction conflicts with § 1039. The statute reads:

> Should an election of representatives in Congress occur after the number of representatives to which the state is entitled shall be changed, in consequence of a new apportionment being made by Congress, and *before the districts shall have changed to conform to the new apportionment*, representatives shall be chosen as follows: . . . if the number of representatives shall be diminished, then the whole number shall be chosen by the electors of the state at large.

(Emphasis added).

The statute says nothing about who can or should adopt redistricting plans. Moreover, it does not require at-large elections whenever the state loses a seat in congress. Instead, it purports to require at-large voting only when the state loses a seat *and* the next election is actually held "before the districts have changed to conform to the new apportionment." In all other situations, Mississippi law requires that the state's members of the United States House of Representatives be elected "by districts." Miss. Code Ann. § 23-15-1033. Historically, they have been elected by districts.

Once the state court adopted a plan, the "districts [had] changed to conform to the new apportionment," and there was no need for at-large elections under the terms of the statute. *See, Carstens v. Lamm*, 543 F. Supp. 68, 77-78 (D. Colo. 1982) (holding that the federal at-large statute, 2 U.S.C. § 2a(c)(5) — which parallels the Mississippi statute — "provides emergency statutory relief" to be utilized only when a seat is lost and neither the legislature nor a court can devise a plan in time for the election). The Mississippi Supreme Court's resolution of the interlocutory petition in *In Re Mauldin* confirms this

reading as a matter of Mississippi law. There, the MREC and the Mauldin state court intervenors contended that § 1039 required at-large elections if the legislature defaulted, and thereby precluded the Chancery Court from adopting a plan. Petition for Writ of Prohibition, *In Re Mauldin*, No. 2000-M-01891 (Miss.), pp. 7-8, 11. We responded with the same argument we make here. *Id.*, Response in Opposition to Petition for Writ of Prohibition, pp. 10-11.[17] The state supreme court rejected the MREC/Mauldin contention, holding that "[a]ny redistricting plan adopted by the chancery court . . . will remain in effect, subject to any congressional redistricting plan which may be timely adopted by the legislature." J.S. App. 111a.

Because the state court adopted a four-district plan here, thus "chang[ing] [the districts] to conform to the new apportionment,"its action in no way conflicts with § 1039. There is no voting change with respect to that statute.

3. The DOJ Letter Requested Information That Is Unnecessary to the Evaluation under Section 5 and the Request Therefore Does Not Extend or Restart the Sixty Day Review Period Prescribed by the Statute.

Even if these matters were voting changes, the information requested on the fiftieth day was unnecessary to the Section 5 retrogression evaluation. In *Georgia v. United States*, the Attorney General requested additional information two weeks after the initial submission. This Court upheld the application of the DOJ regulation restarting the 60 day calendar upon the receipt of the information. In so doing, the Court noted: "There is no serious claim in this case that the additional information requested was unnecessary or irrelevant to § 5 evaluation of the submitted reapportionment plan." 411 U.S. at 540. The Court also said:

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[17] Copies of these documents will be lodged with the Clerk of this Court..

> The appellants contend that to allow the Attorney General to promulgate this regulation is to open the way to frivolous and repeated delays by the Justice Department of laws of vital concern to the covered States. No such conduct by the Attorney General is presented here, and by upholding the basic validity of the regulation we most assuredly do not prejudge any case in which such unwarranted administrative conduct may be shown.

Id. at 541 n.13.

Here, the information sought is irrelevant and unnecessary. The request for it was unwarranted and even frivolous. The delay in waiting until the fiftieth day to make the request was inexcusable. Restarting the sixty day period under these circumstances contravenes the statutory language of Section 5.

Under this Court's decisions, retrogression or an intent to retrogress are the only proper grounds for a Section 5 objection. *See, Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000). The information sought in the February 14 letter does not relate to these factors. For example, the letter posed a hypothetical: "may a Chancery Court judge, selected in a county that is 95% white . . . impose a redistricting plan binding the entire state?" J.S. App. 194a. But Section 5 does not prohibit state courts from exercising jurisdiction in redistricting cases simply because each of the trial court judges is elected by a small percentage of the state's voters or because some judges are elected from districts with particular racial demographics. If it did, this Court's unanimous decision in *Growe v. Emison* would be inapplicable in those many Section 5 states where trial judges are elected and where the courts began hearing redistricting cases after Section 5 became effective in the mid-1960s.

The simple fact that a particular official among a designated group of officials could potentially adopt a retrogressive plan does not mean that any allocation of

redistricting authority to that category of officials is itself retrogressive. Although a state court judge could adopt a retrogressive plan, and the state supreme court could affirm it, the state legislature could do the same thing. The retrogression can be cured, however, by preclearance review of the plan itself. Questions about venue, alleged forum shopping, and the racial demographics of the judicial election districts are unnecessary to the Section 5 evaluation.[18] The DOJ focus should be on retrogression in the state court plan — of which there is none — and not any unfounded concerns it purports to have about the operation of the state court system.

Clearly, the state court plan itself was not retrogressive and it therefore gave the Attorney General no basis for a Section 5 objection. Of course, neither did the fact that the plan was adopted by an elected Mississippi state court judge, subject to review by the Supreme Court of Mississippi, allow for an objection. Had the Attorney General objected on that ground, similar objections would be required to all state court redistricting plans in Section 5 states where judges are elected.

Indeed, since refusing to issue a decision in Mississippi, the Attorney General has precleared a statewide legislative redistricting plan adopted by a single North Carolina trial judge. The preclearance of that plan demonstrates that the information sought in Mississippi was unnecessary, and proves that the Department was disingenuous in delaying a preclearance decision on that basis. In *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002), the North Carolina Supreme Court affirmed a trial court ruling that the legislative redistricting plan recently adopted by the North Carolina General Assembly violated the

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[18] As stated in the Mississippi Attorney General's response to the February 14 letter, the districts for electing chancery judges in Mississippi were precleared previously by the United States Attorney General, who was provided with their racial demographics at that time. J.S. App. 208a-209a.

state's constitution, and then remanded the case for the trial court to adopt an interim plan for the 2002 legislative elections. This was the first time the North Carolina Supreme Court had authorized the courts to adopt a statewide redistricting plan. Prior to the Voting Rights Act, the Court had held that any question about the lawfulness of a legislative redistricting plan "is a political one, and there is nothing the courts can do about it" because "[t]hey do not cruise in nonjusticiable waters." *Leonard v. Maxwell*, 3 S.E.2d 316, 324 (N.C. 1939).

After this year's state supreme court decision in the *Stephenson* case, the North Carolina trial court on remand devised a new plan that was submitted to the Attorney General for preclearance. The submission was completed on June 28, 2002, and preclearance was granted 14 days later. None of the information sought about the Mississippi courts was submitted to the DOJ or requested by the DOJ in a more information letter.[19] If the DOJ really believed the first post-Act assumption of jurisdiction by a state's courts to be a voting change, and really believed this sort of information necessary to evaluate such a change, it would have sought the information in North Carolina that it did in Mississippi. The fact that it did not do so shows that the request in Mississippi was simply a ruse so that top officials in the Department could delay a preclearance decision. This allowed the federal court to displace the state court plan and implement one that those officials likely knew was more favorable to their political allies. *See* J.S. App. 198a (February 14 letter of the Assistant Attorney General for Civil Rights explaining that the federal court plan "will be imposed if the Department does not very soon complete its review of the State's submission.")

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[19] Details about the North Carolina submission are contained in the chart and the letter in the appendix to the brief *amicus curiae* being filed in support of the appellants in the present case.

Under Section 5, the Attorney General may not suspend or restart the statutory sixty-day review period at will. The DOJ regulation, 28 C.F.R. § 2137, allowing that period to begin anew when more information is requested is a means of insuring that the review period does not commence when the information submitted is so inadequate that the voting change cannot be said to have "been submitted . . . to the Attorney General" (to quote Section 5). But where the additional information is unnecessary and even irrelevant to the Section 5 evaluation, nothing about that information demonstrates that the change has not "been submitted." Thus, the sixty day calendar may be started anew only if the omission of necessary information precludes the Section 5 evaluation to such an extent that the voting change truly has not "been submitted" for review.

If it were otherwise, the Department of Justice could do as it has done here and seek unnecessary information about state court procedures when those courts adopt plans, or unnecessary information about legislative procedures when legislatures adopt them, and thereby delay preclearance in a situation where time is of the essence. The present case is a perfect example. The Department's fiftieth day request for more information, along with the unjustified failure to provide a prompt decision once the new information was received, prevented the enforcement of the plan adopted by the state authorities. That gave the federal court grounds, even apart from its questionable Article I, § 4 holding, to substitute its own plan for that of the state courts in the 2002 congressional election. The delay is inexcusable, particularly in light of what this Court has described as "the reality that States must often redistrict in the most exigent circumstances . . . during the brief interval between completion of the decennial federal census and the primary season for the general elections in the next even-numbered year." *Growe v. Emison*, 507 U.S. at 35.

Unfortunately, the District Court here contributed to the

problem by injecting itself into a substantive Section 5 question that was beyond its purview, gratuitously stating, "it is not at all clear that [the state supreme court's *In Re Mauldin* decision] is not retrogressive," and adding that, "at the very least, the Attorney General . . . might perhaps request more information. . . ." J.S. App. 100a. This contradicts a long line of cases holding that local federal courts should not indulge in such speculation about matters that "are relevant only to questions reserved by § 5 for consideration by the Attorney General . . . or the District Court for the District of Columbia." *Perkins v. Matthews*, 400 U.S. 379, 386 (1971).

The problem is particularly acute where, as here, the DOJ delay appears to be politically motivated. As indicated by the chart at the end of the brief *amicus curiae* submitted in support of the appellants, no other post-2000 congressional or legislative redistricting plan was subjected to the type of delays the DOJ imposed here. In each of the other states, preclearance of congressional plans was completed prior to the qualifying deadline. And, as just mentioned, the statewide plan drafted by a North Carolina judge was expedited in a manner dramatically different from what occurred in Mississippi. In such circumstances, political motives seem to be the only rational explanation for the difference in treatment. The sixty day review period provided by Congress helps to limit any inclination that political appointees in the DOJ might have to manipulate the Voting Rights Act for political purposes. When that period can be unilaterally expanded by the Attorney General, the potential for mischief increases significantly.

The alleged voting changes were "submitted" on December 26. No one has identified any information that is so necessary to the Section 5 evaluation that the purported changes cannot be said to have "been submitted." The North Carolina events confirm this. Given that no objection was interposed within sixty days of the submission of the state court redistricting plan, the plan has been precleared under Section 5.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the decision of the District Court should be reversed.

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No. 01-1437 (II)

In The

Supreme Court of the United States

SEP 26 2002
CLERK

BEATRICE BRANCH, *et al.*,

Appellants,

v.

JOHN ROBERT SMITH, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE, *et al.*,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

BRIEF OF APPELLEES JOHN ROBERT SMITH, SHIRLEY HALL, GENE WALKER, AND MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE

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QUESTIONS PRESENTED

1. Does Article I, § 4 of the United States Constitution permit a state court, in adjudicating a claim brought only under state law, to order its own congressional redistricting plan into effect when that State's Legislature has directed by statute that election of Representatives be conducted at large?

2. Where the law of a State covered by § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, has previously provided that its courts may not entertain challenges to the manner of election of Members of the United States House of Representatives, must an order by its Supreme Court authorizing a trial court to impose a redistricting plan be reviewed and approved under § 5; and, if so, may the plan imposed by the trial court be reviewed under § 5 before the Supreme Court order granting jurisdiction has been approved?

3. Does this Court have jurisdiction under 28 U.S.C. § 1253 or 42 U.S.C. § 1973c to review the District Court's order of June 3, 2002, denying a motion filed after judgment which did not suspend the finality of that judgment, where appellants failed to file a notice of appeal within the time permitted by 28 U.S.C. § 2101 and this Court's Rule 18.1?

LIST OF PARTIES

Appellants:

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL.

Appellees:

JOHN ROBERT SMITH; SHIRLEY HALL; GENE WALKER; ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE.

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JURISDICTION

Because appellants, who were intervenors in the District Court, timely filed a notice of appeal, this Court has jurisdiction under 28 U.S.C. § 1253 to review the District Court's final judgment of February 26, 2002. App. 1a.[1]

On April 23, 2002, intervenors filed a new motion for a declaration that their congressional redistricting plan, which had been adopted by the Chancery Court for the First Judicial District of Hinds County, Mississippi, on December 31, 2001, App. 113a, had been approved as a matter of law under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. J.App. 30. The District Court denied that motion by order of June 3, 2002. J.App. 37. Although intervenors seek review of that order in Part II.A of their brief, they never filed the notice of appeal required by this Court's Rule 18.1 within the time permitted by 28 U.S.C. § 2101. Under these circumstances, it appears unlikely that this Court has jurisdiction to consider the effect upon the original judgment of the subsequent actions cited by intervenors.

There appears to be no reported decision in which this Court has considered its jurisdiction under § 1253 to review a postjudgment order of a district court resolving a motion which does not affect the finality of the underlying judgment. However, considering another statutory scheme of jurisdiction in *Stone v. I.N.S.*, 514 U.S. 386 (1995), this Court reasoned by analogy from the practice governing appeals to the courts of appeals of orders denying motions for relief under Fed.R.Civ.P. 60(b). "The denial of the motion is appealable as a separate final order. . . ." *Id.*, at 401. This Court then described the general rule which

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[1] The citation "App." refers to the Appendix to the Jurisdictional Statement in this appeal. The citation "J.App." refers to the Joint Appendix prepared for this appeal and the separate cross-appeal, *Smith v. Branch*, No. 01-1596, pursuant to this Court's Rule 26.

Congress would have had in mind when adopting the particular jurisdictional scheme at issue:

> Motions that do toll the time for taking appeal give rise to only one appeal in which all matters are reviewed; matters that do not toll the time for taking an appeal give rise to two separate appellate proceedings that can be consolidated.

Id., at 403.[2]

Although intervenors did not specify the authority under which they filed their postjudgment motion, that motion plainly did not toll the time for appealing the original judgment; indeed, that judgment had already been appealed. In all likelihood, the motion was filed under Rule 60(b), which an appellant may file "[e]ither before or after filing his appeal." *Id.*, at 401.[3] As *Stone* suggests, Congress would have understood in adopting § 1253 that appellate review of an order resolving such a motion would ordinarily require a separate appeal.

There may be some question as to whether the order of June 3 is appealable at all, as it neither granted nor denied "an interlocutory or permanent injunction," within the language of § 1253. However, the language of § 5 of the Voting Rights Act is broader, declaring that "any appeal shall lie to the Supreme Court." *See Allen v. State Bd. of Elections*, 393 U.S. 544, 561-63 (1969). In light of *Allen*,

[2] In *Stone*, because the statute in question authorized the consolidation of two separate appellate proceedings, this Court concluded that a motion for reconsideration of a deportation order did not affect the finality of that order or stay the time for filing an appeal therefrom. The deportation order and the order resolving the reconsideration motion required separate appeals, to be consolidated by the reviewing court. *Id.*, at 400-01.

[3] Arguably, the conduct of the Department of Justice after February 26 might be considered "newly discovered evidence" under Rule 60(b)(2) or "any other reason justifying relief from the operation of the judgment" under Rule 60(b)(6).

this Court's jurisdiction over § 5 appeals has been described as "unrestricted." R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 2.10(d) at 101 (8th ed. 2002). Applying the similar appellate language of § 4(a) of the Voting Rights Act, 42 U.S.C. § 1973b(a), this Court entertained an appeal from an order denying intervention in *National Ass'n for the Advancement of Colored People v. New York*, 413 U.S. 345 (1973), and suggested that the statutory words "any appeal" could be broad enough "to include review of any meaningful judicial determination made in the progress of the § 4 lawsuit." *Id.*, at 353-54. In light of these precedents and the broad language of § 5, it seems likely that review of the June 3 order lies within the appellate jurisdiction of this Court, and of no other.

Because the District Court's order of June 3 is appealable under § 5, and because intervenors have not perfected a separate appeal from that order, the issues raised by their motion of April 23 are not properly before the Court.

STATUTES AND REGULATIONS

Jurisdiction over this appeal exists under two statutes. The first is 28 U.S.C. § 1253, which provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Jurisdiction is also provided by § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which provides in pertinent part:

> Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

The resolution of the statutory issue raised by intervenors in their appeal requires consideration of certain portions of the Attorney General's regulations governing

administration of § 5 of the Voting Rights Act. 28 C.F.R. § 51.15 provides in pertinent part:

> (a) With respect to legislation (1) that enables or permits the State or its political subunits to institute a voting change or (2) that requires or enables the State or its political subunits to institute a voting change upon some future event or if they satisfy certain criteria, the failure of the Attorney General to interpose an objection does not exempt from the preclearance requirement the implementation of the particular voting change that is enabled, permitted, or required, unless that implementation is explicitly included and described in the submission of such parent legislation.
>
> (b) For example, such legislation includes –
>
> (1) Legislation authorizing counties, cities, school districts, or agencies or officials of the State to institute any of the changes described in § 51.13. . . .

28 C.F.R. § 51.22 provides in pertinent part:

> The Attorney General will not consider on the merits:
>
> (a) Any proposal for a change affecting voting submitted prior to final enactment or administrative decision or
>
> (b) Any proposed change which has a direct bearing on another change affecting voting which has not received section 5 preclearance. . . .

28 C.F.R. § 51.35 provides in pertinent part:

> The Attorney General will make no response on the merits with respect to an inappropriate submission but will notify the submitting authority of the inappropriateness of the submission. Such notification will be made as promptly as possible and no later than the 60th day following receipt and will include an explanation of the inappropriateness of the submission. Inappropriate submissions include . . . premature submissions (see §§ 51.22, 51.61(b)). . . .

STATEMENT OF THE CASE

Plaintiffs in this action are three Mississippi voters. The complaint they filed in the United States District Court for the Southern District of Mississippi on November 1, 2001, had nothing to do with the Voting Rights Act of 1965. Instead, proceeding under 42 U.S.C. § 1983, they sought to enjoin the enforcement of Mississippi's statute requiring election of five Members of the United States House of Representatives, Miss. Code Ann. § 23-15-1037 (Rev. 2001), because Mississippi had lost a seat as a result of the 2000 census. Plaintiffs asked the Court to order Representatives to be elected at large, as required by 2 U.S.C. § 2a(c)(5) and Miss. Code Ann. § 23-15-1039 (Rev. 2001). In the alternative, they asked the Court to devise its own plan dividing the state into four districts. They named as defendants the Mississippi Republican Executive Committee and the Mississippi Democratic Executive Committee, who administer the Mississippi statutes governing nominations to Congress, as well as Governor Ronnie Musgrove, Attorney General Mike Moore, and Secretary of State Eric Clark, who administer general elections in their capacities as members of the State Board of Election Commissioners. On November 8, 2001, plaintiffs filed their motion for preliminary injunction. By order filed November 21, 2001, the Chief Judge of the United States Court of Appeals for the Fifth Circuit constituted a three-judge District Court, pursuant to 28 U.S.C. § 2284.

On November 29, 2001, Beatrice Branch and six other voters moved to intervene as defendants. Intervenors, who are appellants here, alleged that they were plaintiffs in a separate action before the Chancery Court of the First Judicial District of Hinds County, Mississippi, which sought a judicially imposed congressional redistricting plan. Their amended complaint in the Chancery Court, attached as an exhibit to their intervention motion in the District Court, named only the three elected state officials

as defendants; the executive committees of the two political parties were not joined.[4] They asked the District Court to defer to the proceedings scheduled to be held in Chancery Court.

On December 5, 2001, the District Court granted the motion to intervene, and denied a motion to dismiss that had been filed by the elected state officials. App. 108a. The Court deferred ruling on the motion for preliminary injunction, noting that *Growe v. Emison*, 507 U.S. 25 (1993), acknowledges the primary responsibility of state officials to conduct congressional redistricting. However, the Court continued:

> We are, nevertheless, mindful of the fact that March 1, 2002, is the qualifying deadline for congressional candidates in Mississippi, and that any redistricting plan developed and adopted by State authorities must be submitted to the United States Department of Justice for preclearance. We are also mindful that the Department of Justice has sixty days to enter its objection to any plan adopted by the State authorities and if the Department of Justice objects to the plan, there is little or no possibility that the filing date of March 1 can be met. Furthermore, we think it imperative to have a plan in place by the qualifying deadline so that all election laws of the State of Mississippi can be met in a timely fashion in order to avoid candidate and voter confusion that results from the flux of delays, date changes, and continuances.
>
> Accordingly, if it is not clear to this court by January 7, 2002, that the State authorities can have a redistricting plan in place by March 1, we will assert our jurisdiction and proceed expeditiously to rule on the Plaintiffs' Motion for Preliminary Injunction, and if necessary, we will draft and implement a plan for reapportioning the state congressional districts.

App. 108a-109a.

[4] Although intervenors had filed their complaint and amended complaint in October, they served no process upon the named defendants until November 2, 2001, the day after plaintiffs filed this action in the District Court.

The next day, the Chancery Court responded to the District Court's pronouncement by signing an order accelerating its trial date to December 14, 2001, instead of the previously announced January 14, 2002. App. 175a-177a. On December 7, 2001, the Chancery Court *sua sponte* reconsidered and vacated its prior order granting the motion of the elected state officials to join the executive committees of the two political parties as indispensable defendants. That same day, Carolyn Mauldin and three other voters, who had been permitted to intervene as defendants in the Chancery Court, joined the Mississippi Republican Executive Committee in filing a petition for writ of prohibition with the Supreme Court of Mississippi, challenging the Chancery Court's jurisdiction over the complaint. On December 11, the three defendant state officials filed a similar petition. Both petitions emphasized that the Supreme Court had held for 70 years that Mississippi trial courts had no jurisdiction to adjudicate disputes over congressional redistricting. *Brumfield v. Brock*, 169 Miss. 784, 142 So. 745 (1932); *Wood v. State ex rel. Gillespie*, 169 Miss. 790, 142 So. 747 (1932).

On the evening of December 13, 2001, hours before the Chancery Court was scheduled to begin trial the next morning, the Supreme Court entered an order in *In re Mauldin*, No. 2001-M-01891 (Miss. Dec. 13, 2001). App. 110a. The order declared:

> After due consideration the Court finds that the Hinds County Chancery Court has jurisdiction of this matter. . . . Any congressional redistricting plan adopted by the chancery court in cause no. G-2001-1777 W/4 will remain in effect, subject to any congressional redistricting plan which may be timely adopted by the Legislature.

App. 111a. The Court issued no opinion.

In light of developments in state court, plaintiffs on December 17, 2001, filed a motion reiterating their claim for a preliminary injunction and seeking to amend their complaint. Plaintiffs sought to allege that developments after the filing of their initial complaint had violated § 5 of the Voting Rights Act. First, they contended that *In re Mauldin*, by reassigning authority to make redistricting decisions to the Chancery Court, constituted enabling legislation within the meaning of 28 C.F.R. § 51.15 and therefore required approval under § 5. Second, they asserted that any redistricting plan ordered by the Chancery Court would itself require approval under § 5. Third, any failure by the Chancery Court or the official defendants to follow § 23-15-1039 requiring elections at large would also constitute a change requiring approval. After a hearing on December 28, 2001, the Court entered an order granting leave to amend on January 7, 2002, and plaintiffs filed their amended complaint the next day.

In an order entered January 15, 2002, the District Court agreed that *In re Mauldin* constituted a change requiring approval under § 5. App. 97a. The Court also ruled that the redistricting plan devised by the Chancery Court plaintiffs and ordered into effect by its judgment of December 31, 2001, App. 113a, required approval under § 5, because it was "a change from the previous districting plan set forth in Miss. Code Ann. § 23-15-1037, and from the at-large plan set forth in Miss. Code Ann. § 23-15-1039 for circumstances such as the present one." App. 98a. After discussing the likely difficulties in obtaining expedited consideration of these multiple changes by the Department of Justice, the Court concluded that "it now appears to be uncertain that the State authorities will have a redistricting plan in place by March 1." App. 104a. The Court therefore decided to "begin the process of holding hearings to fashion a congressional reapportionment plan for the State to assure that the election process operates on schedule and without temporal change." App. 105a.

Intervenors offer no criticism of the trial conducted by the District Court on January 28 and 29, 2002. Nor do they identify any legal defect in the remedial redistricting

plan announced by the District Court's opinion of February 19, 2002, App. 25a, and put into effect by its final judgment of February 26, 2002. App. 1a. Rather, intervenors contend that the Chancery Court judgment had already become enforceable on February 26 because the letter of February 14, 2002, from the Department of Justice requesting additional information from Attorney General Moore was insufficient to toll the running of the 60 days available for objection under § 5. They further claim that the Chancery Court judgment became effective at the latest on April 22, 2002, when the Department failed to object after Attorney General Moore's resubmission on February 19, 2002, a position that was rejected by the District Court's order of June 3, 2002. J.App. 37. Intervenors also attack the separate basis for the District Court's judgment, set forth in its opinion of February 26, 2002, App. 4a, that the Elections Clause of the United States Constitution, Art. I, § 4, by its delegation of power to the Mississippi Legislature, precluded enforcement of the Chancery Court's judgment.

Because of the specific challenges raised by intervenors on their appeal, the demographic details of the two plans have no relevance. Because intervenors emphasize that the Chancery Court's adoption of their plan would have created a black voting age population majority of 59.02% in District 2, Appellants' Brief at 5 n.2, it is worth noting that the District Court judgment creates a black voting age majority of 59.20% in District 2. App. 65a. At trial, plaintiffs and the Mississippi Republican Executive Committee objected unsuccessfully to the admission of the political statistics upon which intervenors continue to rely. Appellants' Brief at 9 n.5.[5] Because intervenors do not

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[5] Intervenors and their amici cannot quite agree on the import of these statistics. While intervenors claim that District 3 in their plan "slightly favored the Republican candidate," Appellants' Brief at 8, their amici acknowledge that the district "was regarded as either leaning Democrat or a political toss-up." Brief *Amici Curiae* of the National

(Continued on following page)

contend that those statistics have any relevance to this appeal, it is not necessary for this Court to review the propriety of their admission into evidence. Neither racial nor political considerations have any bearing on the issues raised by this appeal.

SUMMARY OF THE ARGUMENT

1. Under Article I, § 4 of the Constitution, the Framers delegated authority to regulate congressional elections to state legislatures and to Congress.

A. States have no inherent or reserved authority to regulate elections to Congress. No branch of state government has any authority over congressional regulations except the authority delegated by the Constitution or by Congress acting pursuant to the Constitution. Thus, the question presented by this case is not whether the Elections Clause *withdraws* authority from state courts, but whether it *delegates* authority to them.

B. In delegating authority to legislatures, the Framers were aware that circumstances might prevent the adoption of regulations necessary to conduct elections to Congress. The Framers delegated additional authority, not to the other branches of state government, but to Congress. Because states differ in the structure of their governments, this Court has occasionally considered whether particular state actors may play a role in regulating congressional elections. The Court ruled in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), that a popular referendum could displace a redistricting plan adopted by a legislature because Congress had so provided in the relevant enabling legislation. In *Smiley v. Holm*, 285 U.S. 355 (1932), the Court found a governor's veto sufficient to preclude enforcement of a redistricting plan adopted by a legislature because the veto was "in accordance with the

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Association for the Advancement of Colored People *et al.* [hereinafter "NAACP Brief"] at 13.

method which the state has prescribed for legislative enactments." *Id.*, at 367-68. Although *Smiley* holds that a state court has jurisdiction to adjudicate a federal challenge to a state regulation of congressional elections, it did not hold that state courts could entertain state law claims. Unreviewable discretionary authority exercised by state courts under state law would be antithetical to the Framers' determination to delegate such discretionary authority to state and federal legislators.

C. By imposing the redistricting plan which intervenors proposed, the Chancery Court displaced the judgment of the Legislature, expressed in Miss. Code Ann. § 23-15-1039 (Rev. 2001), that Representatives should be elected at large. Here, the complaint which intervenors filed in Chancery Court relied only on state law. The only state law claim that can possibly arise in the course of challenging the legislative regulation of congressional elections, other than the meaning of the regulation itself, is whether it has been properly adopted in accordance with regular legislative procedures. While it is true that any remedy imposed by a state court must comply with federal law, it does not follow that any claim can exist under state law which would allow a state court to enter a remedy in the first place. Recognition of these principles will not displace the authority of state courts to litigate redistricting claims, because all other such litigation in state courts seems to have raised federal claims.

D. The District Court's ruling does not contravene *Growe v. Emison*, 507 U.S. 25 (1993). The Minnesota court, unlike the Chancery Court here, adjudicated a federal claim. Whether or not the Minnesota Legislature delegated authority over redistricting to its courts, the District Court's opinion here does not preclude the possibility that other States may do so. The propriety of the use of special commissions to conduct congressional redistricting is not threatened by the District Court's opinion here.

2. Although intervenors find no fault in the redistricting plan adopted by the District Court, they claim that the Chancery Court plan became enforceable either before

or after the entry of the District Court's judgment because of the failure of the Department of Justice to interpose an objection under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. In fact, preclearance has never been obtained.

A. All parties agree that intervenors' redistricting plan, as adopted by the Chancery Court, requires preclearance under § 5. The District Court correctly ruled that the reassignment of jurisdiction over congressional redistricting to the Chancery Court was also a change within the meaning of § 5, because it constitutes enabling legislation "authorizing . . . officials of the State to institute any of the changes" in election procedures. 28 C.F.R. § 51.15(b)(1). Because the drafters of redistricting plans exercise an immense amount of discretion, it is important for the Justice Department to be satisfied that a change in authority is not likely to result in the exercise of discretion in a discriminatory fashion. Likewise, the Chancery Court's decision to disregard the at-large election requirement of § 23-15-1039 constitutes a voting change. The District Court rejected intervenors' contrary reading of the statute as a matter of state law.

B. Because the propriety of the Chancery Court's jurisdiction had not been resolved, the Department properly concluded that consideration of intervenors' redistricting plan was inappropriate under 28 C.F.R. § 51.35. The Department's questions in its letter of February 14, 2002, concerning the Chancery Court's jurisdiction did not constitute unwarranted administrative conduct. Because the reassignment of jurisdiction was a covered change, it was plainly within the Department's authority to resolve the propriety of that change before turning to the redistricting plan imposed by that Court. The letter of February 14 was therefore sufficient to toll the running of the 60 days under § 5, so that no change went into effect for lack of an objection.

C. After Attorney General Moore resubmitted the proposed changes by letter of February 19, 2002, the District Court enjoined the enforcement of the Chancery Court's judgment on constitutional grounds. The Department

properly concluded in its letter of April 1, 2002, that consideration of the changes was inappropriate in light of the pending injunction. Section 5 only allows consideration by the Attorney General when a covered jurisdiction "shall enact or seek to administer" any change in voting practices. Only the Legislature, not the Chancery Court, can enact a law, and the Chancery Court did not seek to administer its own judgment, having instructed the defendant state officials to do that. But those officials no longer seek to administer that judgment, because they have not appealed the District Court's injunction. Because the Department properly concluded that submission under § 5 was inappropriate in these circumstances, the failure to object within 60 days did not place intervenors' redistricting plan into effect.

ARGUMENT

I. UNDER ARTICLE I, SECTION 4 OF THE CONSTITUTION, THE CHANCERY COURT HAD NO POWER TO IMPOSE A CONGRESSIONAL REDISTRICTING PLAN.

The Framers of the Constitution did not choose to adopt permanent procedures to govern the election of Members of Congress. Instead, recognizing the likely need for flexibility as the nation would grow and change, they chose to delegate the authority to make and revise such regulations. Article I, § 4 of the Constitution declares in pertinent part:

> The Times, Places, and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations. . . .

The Framers delegated no authority to the courts of the several States. Because the District Court here properly found that the Mississippi Legislature had not delegated any of its authority to the Chancery Court, it properly

enjoined the enforcement of the Chancery Court's judgment. App. 7a.

A. States have no power over elections to Congress except that delegated by the Constitution.

The desire for change in the manner of election of Members of Congress, which the Framers anticipated, has manifested itself often over the course of the last decade. As States have sought to impose new requirements and regulations, this Court has frequently been asked to review their propriety. In each case, this Court has ruled that States have no inherent authority to regulate congressional elections; instead, their power to do so is delegated by the Constitution itself and must be exercised consistently with the Constitution and with acts of Congress.

In *U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779 (1995), this Court considered an amendment adopted by the people of Arkansas to that State's constitution which precluded individuals from appearing on the ballot for the House of Representatives after serving three terms in that body or for the Senate after serving two terms there. After finding the issues to be justiciable, this Court examined the source of the State's power to impose such regulations. Rejecting the notion that such power was reserved under the Tenth Amendment, the Court said:

> As Justice Story recognized, "The state can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the Constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed." 1 [J.] Story[, Commentaries on the Constitution of the United States] § 627 [(3d ed. 1858)].

514 U.S. at 802. The Court then went on to describe Art. I, § 4 as an "express delegation[] of power to the States to act with respect to federal elections." *Id.*, at 805. The Court concluded:

> [A]ny state power to set the qualifications for membership in Congress must derive not from the reserved powers of state sovereignty, but rather from the delegated powers of national sovereignty. In the absence of any constitutional delegation to the States of power to add qualifications to those enumerated in the Constitution, such a power does not exist.

Id. The Court went on to reject the contention that the Arkansas amendment did not add new qualifications for office, but merely regulated ballot access within the authority delegated by Art. I, § 4. Describing the power delegated by the clause, the Court said, "The Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office." *Id.*, at 832-33.

Three terms later, this Court unanimously affirmed in *Foster v. Love*, 522 U.S. 67 (1997), that state regulations must be consistent with regulations adopted by Congress. Describing the power delegated by Art. I, § 4, the Court said, "Thus it is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States." *Id.*, at 69, citing *U.S. Term Limits*, *supra*, 514 U.S. at 832-33. Because Congress in 2 U.S.C. §§ 1 and 7 required Representatives and Senators to be elected on the Tuesday after the first Monday in November, this Court invalidated that part of Louisiana's open primary law which allowed the election to be completed at a first primary in October.

Finally, in *Cook v. Gralike*, 531 U.S. 510 (2001), this Court reviewed a constitutional amendment adopted by the voters of Missouri to require identification on the ballot of those Members of Congress that had not supported term limits. Invalidating that regulation, this Court summarized its jurisprudence and made clear that no power to regulate congressional elections exists beyond that delegated by the Constitution:

The federal offices at stake "aris[e] from the Constitution itself." *U.S. Term Limits, Inc., v. Thornton*, 514 U.S., at 805. Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power "had to be delegated to, rather than reserved by, the States." *Id.*, at 804. Cf. 1 Story § 627 ("It is no original prerogative of state power to appoint a representative, a senator, or president for the union"). Through the Elections Clause, the Constitution delegated to the States the power to regulate the "Times, Places and Manner of Holding Elections for Senators and Representatives," subject to a grant of authority to Congress to "make or alter such Regulations." Art. I, § 4, cl. 1; see *United States v. Classic*, 313 U.S. 299, 315 (1941). No other constitutional provision gives the States authority over congressional elections, and no such authority could be reserved under the Tenth Amendment. By process of elimination, the States may regulate the incidents of such elections, including balloting, only within the exclusive delegation of power under the Elections Clause.

Id., at 522-23.[6]

Here, the Chancery Court prescribed the method of election of Representatives by imposing a redistricting plan. Its judgment could be valid only if the Chancery Court found the power to do so "within the exclusive

[6] In *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000), this Court discussed the similar power of state legislatures to provide for the appointment of Presidential electors, describing it as "a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Id.*, at 76. Whatever procedures a State may employ to review or revise the decisions of its legislature in other circumstances, this Court observed that the constitutional grant "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." *Id.*, quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

delegation of power under the Elections Clause." *Id.*, at 523. Thus, intervenors in Part I.C of their brief state the question backwards; the issue is not whether the Elections Clause *withdraws* authority from state courts, but whether it *delegates* authority to them.[7] As will be demonstrated hereafter, the District Court properly concluded that neither the Elections Clause nor the Mississippi Legislature delegated any such power to the Chancery Court. It therefore properly enjoined enforcement of its judgment.

B. The Framers intended power to be exercised by legislative authorities subject to federal control, not control by other state authorities.

The constitutional delegation of power to make redistricting decisions seems quite clear on its face. In FEDERALIST No. 59, Alexander Hamilton explained the necessity and propriety of legislative regulation of congressional elections:

> [I]t will therefore not be denied, that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last

[7] *Wesberry v. Sanders*, 376 U.S. 1 (1964), did not address the delegation by Art. I, § 4 of the authority to make regulations to govern elections to Congress. Rather, this Court held that Art. I, § 4 does not insulate those regulations from review by the courts to determine their compliance with federal law, specifically Art. I, § 2. Here, the Chancery Court conducted no such review because intervenors, as plaintiffs in that court, raised no federal claim.

> mode has, with reason, been preferred by the convention.

It would have astounded the Framers to suppose that the state courts should have "a discretionary power over elections" to Congress, such as that exercised by the Chancery Court here.

The Framers delegated this authority not to the States, to be exercised as the States might choose, but quite specifically to state legislatures. Other provisions of the Constitution show that the Framers knew how to specify the state authorities to exercise particular powers. Besides authority over elections to Congress, seven other powers were given to the state legislatures: to appoint Senators (Art. I, § 3); to consent to land purchases by Congress (Art. I, § 8); to provide the manner for appointing presidential electors (Art. II, § 1); to consent to subdivision of a state (Art. IV, § 3); to seek national help during a domestic disturbance (Art. IV, § 4); to apply for a constitutional convention (Art. V); and to ratify amendments if Congress chooses that method (Art. V). Two of these – the power to fill Senatorial vacancies in Art. I, § 3 and to seek emergency national help in Art. IV, § 4 – explicitly provide for state *executive* gap filling. No discretionary power whatsoever is delegated to the state courts.

The Framers were quite conscious that state legislatures might be unable or unwilling to discharge the powers delegated to them by the Constitution. Hamilton in FEDERALIST No. 59 expressed particular concern that they might fail to provide for elections to Congress:

> Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs.

Although the Framers could have assigned the power to cure legislative defaults to other state authorities, as they had in Art. I, § 3 and Art. IV, § 4, they chose instead to

place that responsibility in federal hands. Charles Cotesworth Pinckney explained to the South Carolina Legislature that this decision stemmed from the fear that local political disputes would cripple the national interest:

> [I]t is absolutely necessary that Congress should have this superintending power; lest, by intrigues of a ruling faction in the state, the members of the House of Representatives should not really represent the people of the state, and lest the same faction, through partial state views, should altogether refuse to send representatives to the general government.

4 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 303 (2d ed. 1888).

The few judicial decisions to consider Art. I, § 4 have construed the term "legislature" broadly enough to include all of a State's legislative authorities, but not so broadly as to include the state courts. In *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), this Court gave effect to a referendum conducted pursuant to Ohio law to invalidate a redistricting plan passed by its Legislature. This Court held that Art. I, § 4 did not preclude Congress from providing by statute that redistricting should be accomplished in the manner provided by state law. *Id.*, at 569-70. The Supreme Court of Ohio had construed its law to the effect that "the provisions as to referendum were a part of the legislative power of the state," *id.*, at 567, thus complying with the controlling congressional statute. This Court held that Congress intended to permit the States to employ referenda in the redistricting process and that Art. I, § 4 permitted Congress to do so. *Id.*, at 568-69.

In *Smiley v. Holm*, 285 U.S. 355 (1932), plaintiffs argued that the Constitution precluded the Governor of Minnesota from vetoing a redistricting plan adopted by that State's Legislature. This Court reasoned that Art. I, § 4 delegates the authority to make law and held "that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative

enactments." *Id.*, at 367-68. An examination of history confirmed that the Framers would have regarded the veto as a legitimate part of the legislative process to which the Constitution had delegated authority:

> At the time of the adoption of the Federal Constitution, it appears that only two states had provided for a veto upon the passage of legislative bills; Massachusetts, through the Governor, and New York, through a council of revision. But the restriction which existed in the case of these states was well known. That the state Legislature might be subject to such a limitation, either then or thereafter imposed as the several states might think wise, was no more incongruous with the grant of legislative authority to regulate congressional elections than the fact that the Congress in making its regulations under the same provision would be subject to the veto power of the President, as provided in article 1, § 7.

Id., at 368-69.

Davis and *Smiley* stand at most for the proposition that the electorate, exercising the referendum power, and the governor, exercising the veto power, may be considered to be among the state legislative authorities to whom redistricting power was delegated by Art. I, § 4, or by Congress acting pursuant to that provision.[8] By no means do those cases support the proposition that, when the Legislature fails to act, other state officials may exercise the "discretionary power over elections" to which Hamilton

[8] This Court has read *Davis* as resting on a congressional delegation of power, describing its opinion as holding that "Congress had itself recognized the referendum as part of the legislative authority of the state for the purpose stated." *Hawke v. Smith*, 253 U.S. 221, 230 (1920). It has been recently suggested that, absent such an affirmative delegation from Congress, the Elections Clause would not permit a popular referendum or initiative to supersede regulations adopted by a legislature. *California Democratic Party v. Jones*, 530 U.S. 567, 602-03 (2002) (Stevens, J., dissenting).

referred. In both *Davis* and *Smiley* the Legislature had actually adopted a plan, but other state legislative authorities prevented it from becoming law. The result in neither case was the adoption of a new and different plan by other state authorities; in *Davis* the prior districting plan remained in effect, while in *Smiley* Representatives were elected at large because Minnesota had lost a seat.

Both *Davis* and *Smiley* were brought in state court to enforce federal claims. In *Davis*, the plaintiffs claimed that the referendum which disapproved the redistricting statute passed by the Ohio Legislature violated both the Elections Clause and the enabling act passed by Congress pursuant thereto. 241 U.S. at 567. The Ohio Supreme Court denied relief, and this Court affirmed. *Id.*, at 570. In *Smiley*, voters brought a federal claim in state court, arguing that the new statute had not been adopted consistent with the power delegated by the Elections Clause, because the Governor's veto denied the statute lawful effect under the regular legislative processes of the State. 285 U.S. at 361-62. Although the Minnesota courts denied relief, this Court reversed and barred enforcement of the Legislature's plan. *Id.*, at 372-73. Thus, *Smiley* holds that a state court has jurisdiction to adjudicate a federal challenge to a state regulation of congressional elections,[9] at least as a general rule.[10]

[9] A majority of this Court so read *Smiley* in *Colegrove v. Green*, 328 U.S. 549 (1946), in which Justice Rutledge's concurrence agreed with the three dissenters on that issue. *Id.*, at 564 (Opinion of Rutledge, J.); *id.*, at 573-74 (Black, J., dissenting). This Court explicitly endorsed that reading of *Smiley* in *Baker v. Carr*, 369 U.S. 186, 202 (1962).

[10] Congress, acting under the Elections Clause or some other delegated power, may preclude state courts from entertaining claims concerning congressional redistricting. Here, the District Court held that no Mississippi court could exercise jurisdiction over such claims until the Supreme Court's decision in *In re Mauldin* had been approved pursuant to § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. App. 98a. As will be demonstrated in Part II.A.1 hereafter, the District Court correctly interpreted and applied § 5. While challenging the District

(Continued on following page)

It does not follow, however, that state courts or other state officials are free to exercise the discretionary power which the Elections Clause delegates to legislators. In *Grills v. Branigin*, 284 F. Supp. 176 (S.D. Ind.), *aff'd mem.*, 391 U.S. 364 (1968), plaintiffs successfully sued members of the Election Board to enjoin enforcement of an unconstitutional districting scheme. When the Indiana Legislature failed to pass a new scheme, the defendants asked the Court to authorize the executive branch defendants to draw the plan. The Court refused: "Article I, Section 4, Clause 1 of the United States Constitution clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts." 284 F. Supp. at 180.

To permit other state officials affirmatively to substitute their discretion for that of the Legislature in redistricting matters might realize Pinckney's fear that the "intrigues of a ruling faction in a state" could produce a congressional election which "should not really represent the people of the state." Here, the leaders of the Mississippi Legislature declined to reach a political compromise, but continued their intrigues in their testimony before the Chancery Court. A federal rule which permits other state officials to resolve political quarrels in place of the Legislature decreases the likelihood that the Legislature will discharge the duties delegated to it by Art. I, § 4, and increases the likelihood that legislators may choose instead to seek political results from state judges.

Although this Court compels deference to the discretionary decisions of legislators operating under the Elections Clause, *Upham v. Seamon*, 456 U.S. 37 (1982), that Clause delegates no such discretion to state judges. Although Mississippi courts may enforce the law through equitable remedies, as intervenors contend, Appellants'

Court's interpretation of § 5, intervenors do not claim that Congress lacked the power to make that determination.

Brief at 27,[11] it is nonsense to suggest that law enforcement is part of "the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367-68.[12] While a state court hearing a federal claim may also exercise remedial discretion, its judgment may be reviewed by this Court for errors of federal law. Here, the Chancery Court's declaration that "fairness to the incumbents is a paramount consideration," App. 131a, would be promptly corrected. *See Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts."). By contrast, this Court would not be able to review an exercise of discretion under state law, except to assure compliance with minimal standards set by the federal Constitution and statutes. As they did in the District Court, *see* App. 30a-34a, intervenors would defend all exercises of the Chancery Court's discretion as determinations of state policy to which this Court must defer.[13]

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[11] One scholar notes that "it is critical to note that 'equitable jurisdiction' is not some formless field that gives all courts an implicit license to do as they please." Epstein, *Symposium: Bush v. Gore: "In such Manner as the Legislature Thereof May Direct": The Outcome in Bush v. Gore Defended*, 68 U.Chi.L.Rev. 613, 628 (2001). The author concludes that a federal court owes no deference to a state court's clear disregard of the instructions of a legislature acting under the similar delegation of Art. II, § 1. *Id.*, at 629.

[12] Mississippi law provides that "[t]he legislative power of the state shall be vested in a legislature." Miss. Const. Art. 4, § 33 (1890). As the District Court observed, App. 11a n.6, the courts are explicitly forbidden to exercise legislative power by Art. 1, § 2. Thus, contrary to intervenors' suggestion, Appellants' Brief at 27, Mississippi courts cannot be part of "the law-making . . . processes of the state." App. 13a.

[13] Indeed, even though intervenors do not challenge the remedy chosen by the District Court, they complain that "[t]he federal court made no pretense of adhering to the policies reflected in the state court's configuration." Appellants' Brief at 8.

This very practical consideration forecloses intervenors' reliance on *Wesberry v. Sanders*, *supra*. There, this Court held that the assignment of authority to Congress in Art. I, § 4 did not preclude the federal courts from enforcing the separate demands of Art. I, § 2 for equal representation. The Framers surely would have understood that any litigation to enforce Art. I, § 2 would be fully reviewable by this Court; even though Art. VI may permit state courts to entertain such federal claims, this Court retains the final authority. Thus, the fact that federal claims may be litigated notwithstanding Art. I, § 4 does not compel the conclusion that state claims, unreviewable in this Court, must be similarly permissible. Certainly, Framers like Pinckney, who feared "intrigues of a ruling faction in a state," would have been unwilling to surrender unreviewable authority to state judges.

The language, history, and prior application of Art. I, § 4 necessitate the conclusion that state courts may not impose congressional redistricting plans in adjudicating a claim brought under state law. As will be demonstrated, that is exactly what the Chancery Court did; the District Court acted properly in precluding enforcement of its judgment.

C. The Chancery Court, resolving a claim brought solely under state law, improperly substituted its own plan of elections to Congress in place of two statutes adopted in accordance with the method the State has prescribed for legislative enactments.

Intervenors argue that the Chancery Court had the power to entertain their complaint, brought solely under Mississippi law, and to impose a remedy requiring state election officials to comply with federal law as the Chancery Court construed it. In Part I.B of their brief, they assert that the remedy imposed here did not usurp the Mississippi Legislature's power under the Elections Clause because the Legislature retains the power to adopt a

different redistricting plan. Part I.C argues that, because federal courts may entertain federal claims attacking state regulations to Congress, state courts must be able to do the same. Part I.D concludes, in misplaced reliance on *Hathorn v. Lovorn*, 457 U.S. 255 (1982), that state courts are obliged to impose a remedy required by federal law even when no federal claim is asserted in the complaint. None of this establishes that state courts acting under state law may displace the decisions of legislatures acting pursuant to federal constitutional delegation.

By ordering state election officials to execute the redistricting plan devised by intervenors as plaintiffs in the Chancery Court, App. 132a, the judgment precluded the enforcement of two statutes adopted by the Legislature under the power delegated by Art. I, § 4. In 1991, the Legislature had adopted Miss. Code Ann. § 23-15-1037 (Rev. 2001), establishing five districts; that statute plainly became unenforceable after the 2000 census when Mississippi's delegation was reduced to four members. However, decades earlier, the Legislature had adopted Miss. Code Ann. § 23-15-1039 (Rev. 2001), calling for Representatives to be elected at large in the event that Mississippi should lose a seat and fail to redistrict. Certainly, the Legislature retains its power under Art. I, § 4, and can adopt a new redistricting plan if both Houses and the Governor agree and if the appropriate federal authority grants approval under § 5 of the Voting Rights Act of 1965. The fact remains, however, that the State successfully ran that gauntlet in 1986 when § 23-15-1039 was reenacted and approved, 1986 Miss. Gen. Laws ch. 495, § 308, but the Chancery Court nevertheless ignored it in substituting its own plan. Here, the Legislature did not default in its duty, but prescribed in advance for the consequences of a political deadlock; the Chancery Court simply chose to do something else.

Disregard of a legislative judgment potentially raises questions about both the legitimacy of the courts and the fairness of the electoral process. It has been suggested that one reason for the similar delegation of power to legislatures in Art. II, § 1 is that "legislatures, in contrast to

courts and executive officials, must enact their rules in advance of any particular controversy. A legislative code is enacted behind a veil of ignorance; no one knows (for sure) which rules will benefit which candidates." McConnell, *Symposium: Bush v. Gore: Two-and-a-Half Cheers for Bush v. Gore*, 68 U.Chi.L.Rev. 657, 662 (2001). The author goes on to explain why federal authorities should enforce respect for legislative decisions:

> Thus, there is wisdom in the provision of Article II, which places authority to set electoral rules in the institution least able to manipulate the rules to favor a particular candidate. . . . [I]n this unique context, there is a constitutionally based federal interest in ensuring that state executive and judicial branches adhere to the rules . . . established by the legislature, and do not use their interpretive and enforcement powers to change the rules after the fact.

Id., at 663.

Here, the Chancery Court may not have manipulated the rules, but intervenors certainly did. The Chancery Court's judgment displacing two acts of the Legislature was founded on a peculiar complaint which never mentioned those statutes at all. The state law claim which intervenors asserted in Chancery Court alleged that the Legislature's Standing Joint Congressional Redistricting Committee had failed to comply with Mississippi statutes requiring a production of a redistricting plan by early December. J.App. 13-14. The remedy they sought, however, was not the enforcement of the Legislature's duty to redistrict in a timely fashion, but the displacement of the Legislature by "adopting and directing the implementation of a congressional redistricting plan for the State of Mississippi." J.App. 15. At no point in their complaint did intervenors claim that the statutes prescribing existing districts or requiring elections at large violated state law or any other law.

Neither in their brief nor at any other place in this record have intervenors ever asserted that their Chancery Court complaint "aris[es] under the Constitution, laws, or treaties of the United States," within the meaning of 28 U.S.C. § 1331. Were that the case, the state court defendants would have been able to remove it to federal court under 28 U.S.C. § 1441(a), and intervenors apparently did not want that to happen.[14] Indeed, intervenors affirmatively rejected any federal claim. Resisting a motion to dismiss, they told the Chancery Court that "our claim in this case is brought specifically under Mississippi law and seeks to enforce Mississippi law." J.App. 19 n.3. Responding to the contention that § 23-15-1039 requires Representatives to be elected at large, they specifically disclaimed any implication that their claim arose under federal law. "We raise federal law at this juncture only to show that even if this at-large option were required by that statute, it is not a viable solution because it violates both federal law and the Mississippi Constitution." *Id.*[15] Indisputably, the Chancery Court complaint asserted no federal claim.

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[14] The Fifth Circuit does not permit removals of complaints which attempt to assert claims under state law, even where a plaintiff's only possible claim arises under federal law. In *Waste Control Specialists, LLC, v. Envirocare of Texas, Inc.*, 199 F.3d 781 (5th Cir. 2000), defendants removed a complaint purporting to state a claim under the Texas antitrust statute. The District Court denied remand, finding that the complaint alleged only a conspiracy which was entirely interstate in nature; while these allegations might state a claim under federal antitrust law, the Texas law applied only to intrastate conspiracies. *Id.*, at 783. The Fifth Circuit reversed, finding it irrelevant whether a state claim actually existed. *Id.*, at 784. Thus, the status of removal law in the Fifth Circuit explains the practical relevance of the fact that, as intervenors concede, their complaint in Chancery Court "mentioned no provisions of federal law." Appellants' Brief at 23.

[15] Although intervenors disparaged § 23-15-1039 in their brief in Chancery Court, they neither attacked it in their complaint nor pursued their argument at trial. The Chancery Court made no finding that § 23-15-1039 was unenforceable; it simply ignored it.

Certainly, it may be necessary for state courts to resolve certain issues of state law in the process of adjudicating a federal claim. In *Davis*, the Supreme Court of Ohio "held that the provisions as to referendum were a part of the legislative power of the state, made so by the Constitution." 241 U.S. at 567. Relying on that interpretation of state law, this Court held that the decision to give effect to that referendum was consistent with the power delegated by Congress under the controlling statute. *Id.*, at 568-69. Indeed, before any state regulation can be enforced, it would seem to be necessary for a Court to conclude that it has been adopted "in accordance with the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367-68. However, because no authority to regulate congressional elections can exist except for that delegated by Art. I, § 4, the only possible state law claims should concern the procedural propriety and the substantive enforcement of a legislature's exercise of the authority delegated by the Elections Clause. Here, intervenors did not plead and the Chancery Court did not find that the two Mississippi statutes superseded by its judgment had not been properly enacted or that election officials would not properly enforce them. Instead, the Chancery Court, purporting to adjudicate a different state law claim, simply ignored the Legislature's regulations and imposed its own. No precedent of this Court suggests that a state court has any such power.

It is true that a state court adjudicating a state law claim must take care that its remedy complies with federal law. That is all that this Court held in *Hathorn v. Lovorn*, *supra*, upon which intervenors rely. There, plaintiffs sought to enforce a statutory regulation of local elections, but the Chancery Court found that it had not been properly adopted under Mississippi law. The Supreme Court of Mississippi reversed and ordered the statute enforced. 457 U.S. at 258-59. This Court simply held that the remedial order could not be enforced absent compliance with federal law. "When a party to a state proceeding asserts that § 5 [of the Voting Rights Act] renders the contemplated relief unenforceable, therefore, the state court must examine the

claim and refrain from ordering relief that would violate federal law." *Id.*, at 269-70.

All parties to this litigation agree that any remedial order entered by any state court on any claim must always comply with federal law; that duty, however, does not establish the authority to issue any remedial order in the first place. Contrary to intervenors' contention, Appellants' Brief at 26, this case does present the question of whether a state court acting under state law may invalidate a plan, properly adopted under state legislative procedures, that otherwise complies with federal law.[16] Because the Elections Clause delegates no such power to state judicial authorities, the Chancery Court had no power to replace the legislative plan with its own, even if its plan might otherwise comply with federal law.

Intervenors contend that affirmance "will leave courts of the vast majority of the states devoid of any authority to hear congressional redistricting cases and adopt congressional redistricting plans," Appellants' Brief at 20, but intervenors are wrong. Under *Smiley*, any state court can adjudicate any federal challenge to a state regulation of elections to Congress, unless that court is somehow prohibited from doing so by operation of § 5 of the Voting Rights Act.[17] Here, intervenors did not challenge the two

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[16] The old statutory five-district plan, of course, is no longer enforceable, but the at-large requirement of § 23-15-1039 is fully consistent with federal law as set forth in 2 U.S.C. § 2a(c)(5). As plaintiffs and the Republican Executive Committee have demonstrated in their cross-appeal, *Smith v. Branch*, No. 01-1596, the federal statute remains in full force and effect.

[17] There is no indication that any of the recent state court cases on which intervenors rely, Appellants' Brief at 20, were decided on state law alone. Most of the opinions indicate only that plaintiffs presented constitutional claims, without specifying whether they arose under state or federal law. *Beauprez v. Avalos*, 42 P.3d 642, 645 (Colo. 2002); *Zachman v. Kiffmeyer*, 629 N.W.2d 98 (Minn. 2001); *Perry v. Del Rio*, 67 S.W.3d 85, 87 (Tex. 2001). In Oregon, however, the trial court explicitly stated that "the plaintiffs challenge the constitutionality of the existing United States congressional districts in Oregon under the Federal

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applicable Mississippi statutes under either federal or state law; instead, under the guise of seeking enforcement of statutes governing legislative procedures, they obtained a judicial regulation of congressional elections that displaced the legislative choice. In disapproving such a result, the District Court did nothing to inhibit straightforward litigation of state and federal redistricting claims in any other court.

D. The District Court's ruling does not contravene *Growe v. Emison*.

As the District Court found, App. 18a, the issue of whether a state court's resolution of a redistricting dispute is consistent with Art. I, § 4 was not raised or decided in *Growe v. Emison*, 507 U.S. 25 (1993). As this Court has recently said, "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001). *Accord*, *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). The issue is therefore one of first impression.

Moreover, the District Court's judgment is consistent with the result in *Growe* for two separate reasons. First, the Minnesota court, unlike the Chancery Court here, adjudicated a federal claim; other state courts will remain free to do the same. Second, the Chancery Court here acted in defiance of the legislative will as expressed in

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Constitution." *Perrin v. Kitzhaber*, No. 0107-07021, slip op. at 1 (Cir. Ct. of Multnomah Cty., Ore., Oct. 19, 2001). Likewise, in New Mexico the trial court ruled, "The current New Mexico congressional districts violate Art. I, § 2 of the Constitution of the United States." Order re: Amendment to the Court's Findings of Fact and Conclusions of Law Filed January 2, 2002, *Jepsen v. Virgil-Giron*, No. D0101-CV-2002-02177 (Dist. Ct. of Santa Fe Cty., N.M., Jan. 2, 2002). In Oklahoma, plaintiffs relied only on federal law. *Alexander v. Taylor*, 2002 Ok. 59, 51 P.3d 1204, 1207 (2002). So far as appears, intervenors are the only litigants in the country who have chosen to rely only on state law in pressing their claims.

§ 23-15-1039; the District Court's opinion left open the possibility that other legislatures might delegate redistricting authority to their courts.

Although the complaint filed by intervenors in Chancery Court asserted no claim under federal law, the Minnesota pleadings in *Growe* were entirely different:

> In January 1991, a group of Minnesota voters filed a state-court action against the Minnesota Secretary of State and other officials responsible for administering elections, claiming that the State's congressional and legislative districts were malapportioned, in violation of the Fourteenth Amendment of the Federal Constitution and Article 4, § 2, of the Minnesota Constitution.

507 U.S. at 27. Appellants suggest that *Growe* holds the precise nature of the claim to be irrelevant to a state court's authority to adjudicate congressional redistricting claims. However, when this Court in *Growe* stated that *Scott v. Germano*, 381 U.S. 407 (1965), "does not require that the federal and state-court complaints be identical," 507 U.S. at 35, it was addressing the obligation of a federal court to defer to state proceedings, not the jurisdiction of the state court. *Growe* held that the federal plaintiffs' assertion of a claim under the Voting Rights Act did not allow them to proceed to the exclusion of the federal constitutional claim being asserted in state court. This Court did not hold that a federal court would be required to abstain in favor of a state law attack on a congressional redistricting plan or that a state court could entertain such an attack consistent with Art. I, § 4.[18]

The District Court also considered whether Minnesota's Legislature may have created statutory authority for its courts to hear such cases. The Court noted that in

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[18] *Germano*, of course, concerned only legislative redistricting. Thus, it cannot support a contention that state courts can or must adjudicate congressional redistricting claims.

Cotlow v. Growe, 622 N.W.2d 561 (Minn. 2001), the Supreme Court of Minnesota relied on two statutes giving its Chief Justice authority to make special assignments in special cases. App. 16a. Concluding that its interpretation of Art. I, § 4 was not precluded by this Court's precedents, the District Court remarked that "there was some, albeit tenuous, legislative authority for the Minnesota Supreme Court's action in *Growe*." App. 18a.

Whether or not the District Court was correct in suggesting that Minnesota's courts may have had legislative authority to proceed, there can be no disputing its conclusion that Mississippi has "no legislative act on which to base the chancery court's authority to act in congressional redistricting." App. 19a.[19] When the Mississippi Legislature fails to redistrict itself or the Circuit or Chancery Courts, Mississippi's Constitution assigns secondary authority respectively to a special commission and to the Supreme Court. Miss. Const. Art. 6, § 152 (1890); *id.*, Art. 13, § 254. "There is no similar legislative grant for redistricting congressional districts." App. 19a.

It is certainly true, as intervenors note, that Art. 6, § 159 of the Mississippi Constitution confers upon the Chancery Court "full jurisdiction in . . . [a]ll matters in equity." Appellants' Brief at 28. It is equally true that judges who would have been acquainted with the framers of that Constitution held 70 years ago that "courts of equity deal alone with civil and property rights and not with political rights." *Brumfield v. Brock*, 169 Miss. 784, 142 So. 745, 746 (1932). Neither the framers nor the legislators who adopted the general jurisdictional statute, Miss. Code Ann. § 9-5-81 (Rev. 1991), intended to delegate redistricting authority to the Chancery Court. While the Supreme Court purported to confer that authority in *In re Mauldin*, the District Court properly observed that it "did

[19] This Court will ordinarily accept the lower court's reading of state law. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 224 n.10 (1985).

not point to any legislative authority that authorized the chancery court to act." App. 21a.

In fact, the Legislature expressly considered its potential failure to agree on a redistricting plan, and, rather than delegating authority to the courts, chose in § 23-15-1039 that, under the circumstances presented here, all Representatives should be elected at large. Thus, the situation here resembles that decried by the three concurring Justices in *Bush v. Gore*, 531 U.S. 98 (2000). Just as Art. I, § 4 delegates to legislatures the power to prescribe rules for conducting elections to Congress, Art. II, § 1 grants them the authority to direct the manner of election of presidential electors.[20] Here, as in *Bush*, "the clearly expressed intent of the legislature must prevail." *Id.*, at 120 (Rehnquist, C.J., concurring). In imposing its own redistricting plan, the Chancery Court unconstitutionally disregarded that clear intent, as set forth in § 23-15-1039.

The District Court specifically left open the possibility that a legislative delegation of congressional redistricting authority might pass constitutional muster. It noted that a delegation to a special commission had been held constitutional under Art. I, § 4 by the Supreme Court of New Jersey in *Brady v. New Jersey Redistricting Comm'n*, 131 N.J. 594, 622 A.2d 843 (1992). App. 22a-23a n.13. Thus, affirmance of the District Court's judgment will not resolve the question of whether other legislatures may delegate redistricting authority to their courts. It will merely establish that the Mississippi Legislature has not done so.

Thus, the District Court's judgment is not inconsistent with *Growe*, nor does it inhibit the ability of state legislatures and courts to resolve their own redistricting disputes. That judgment should be affirmed.

[20] As the three dissenting Justices observed, "It is perfectly clear that the meaning of the words 'Manner' and 'Legislature' as used in Article II, § 1, parallels the usage in Article I, § 4. . . . " *Id.*, at 123 n.1 (Stevens, J., dissenting).

II. BECAUSE NO MISSISSIPPI CONGRESSIONAL DISTRICTING PLAN HAS BECOME LAW, THE DISTRICT COURT PROPERLY IMPOSED A PLAN.

Intervenors offer no criticism of the redistricting plan adopted by the District Court. They make no contention that the District Court ignored constitutional requirements or the remedial principles announced by this Court's precedents. Rather, they claim only that there was no wrong to remedy, because a new redistricting plan for Mississippi had already taken effect. They assert that their plan was properly submitted by General Moore after its approval by the Chancery Court and that the letter of February 14, 2002, from the Chief of the Voting Rights Section of the Department of Justice was insufficient to toll the time for review under § 5 of the Voting Rights Act; they add that, in any event, the plan took effect when no objection was entered within 60 days after its resubmission on February 20, 2002. Appellants' Brief at 29. Because, as will be seen, intervenors' plan has not been precleared, the District Court's judgment imposing its own plan must be affirmed.

A. The District Court properly ruled that all three submitted changes required approval under § 5 of the Voting Rights Act.

General Moore's letter of December 26, 2001, to the Department of Justice submitted three changes for preclearance under § 5 of the Voting Rights Act: (1) intervenors' redistricting plan, as embodied in the Chancery Court's order of December 21, 2001; (2) the reassignment of jurisdiction over redistricting to the Chancery Court by the Supreme Court's order of December 13, 2001, in *In re Mauldin*; and (3) the judicial imposition of a redistricting plan to the extent that it departed from the at-large requirement of § 23-15-1039. App. 227a-229a. Intervenors admit that their redistricting plan required preclearance under § 5, but they deny that the other two submissions needed preclearance. In fact, all three changes are subject

to § 5. Because *In re Mauldin* had not been precleared, the Department of Justice and the District Court properly concluded that consideration of intervenors' redistricting plan itself was premature.

1. The order in *In re Mauldin* is enabling legislation under 28 C.F.R. § 51.15(b)(1).

The indispensable key to intervenors' statutory argument is that the Supreme Court's order in *In re Mauldin* is not a voting change which requires approval under § 5 of the Voting Rights Act. The District Court found to the contrary, and the Department of Justice seems to have agreed. The District Court stated that *In re Mauldin* "clearly appears to be a change in Mississippi's election procedures that must be precleared by federal authorities." App. 97a.[21] *See also* App. 33a. The letter to General Moore from the Chief of the Department's Voting Rights Section described the order "that granted the Chancery Court of Hinds County jurisdiction to adopt and direct the implementation of a congressional redistricting plan" as a "change in voting procedure." App. 193a. Intervenors bewail at some length the supposedly dire consequences of that finding, but they offer no analysis of the statute or its implementing regulations which would undermine the conclusion reached by the District Court and the Department.

The broad reach of § 5 is well known. This Court has repeatedly stated that "Congress intended to reach any state enactment which altered the election law of a covered State

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[21] The Court observed that jurisdiction over challenges to redistricting plans had been rejected 70 years ago in *Brumfield*, *supra*, and *Wood v. State ex rel. Gillespie*, 169 Miss. 790, 142 So. 747 (1932). Contrary to intervenors' suggestion, Appellants' Brief at 35, *Carter v. Luke*, 399 So.2d 1356 (Miss. 1981), *rev'd sub nom.*, *Hathorn v. Lovorn*, *supra*, was not a redistricting case, but an action to enforce a statute requiring election, not appointment, of school board members. 457 U.S. at 258.

in even a minor way." *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969). The Attorney General has confirmed this broad scope in the regulations implementing the statute:

> Any change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the section 5 preclearance requirement.

28 C.F.R. § 51.12. The regulations explicitly list redistricting decisions as being among those requiring preclearance. 28 C.F.R. § 51.13(e).

Deciding who shall have authority to make redistricting decisions may be one step removed from the redistricting itself, but it still falls within the scope of § 5. The regulations describe "enabling legislation" to include any provision "that enables or permits the State or its political subunits to institute a voting change." 28 C.F.R. § 51.15(a). Specific examples of such enabling legislation include:

> (1) Legislation authorizing counties, cities, school districts, or agencies or officials of the State to institute any of the changes described in § 51.13.

28 C.F.R. § 51.15(b)(1). *In re Mauldin* falls squarely within this definition.[22] The judges of Mississippi's Chancery Courts are "officials of the State," and *In re Mauldin* authorizes them "to institute [one] of the changes described in § 51.13," the preparation and imposition of redistricting plans. This Court has expressly approved the authority of the Attorney General to promulgate regulations implementing § 5, *Georgia v. United States*, 411 U.S.

[22] Although judicial orders would not generally be characterized as "legislation," all parties agree that voting changes are subject to § 5 even when ordered by courts, rather than by legislative authorities. *Hathorn v. Lovorn*, *supra*.

526, 536 (1973), and it has traditionally given great deference to his application of the Act. Because this Court could agree with the Attorney General that a city's annexation of a vacant lot requires approval under § 5, *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987), it should have no difficulty in agreeing here with the District Court and the Justice Department that the reassignment of redistricting authority to the Chancery Court constitutes a change affecting voting.

Pursuant to its regulations, the Department of Justice has consistently acknowledged that a transfer of redistricting authority is subject to § 5. In a document available for public review on the Internet, the Department continues to declare:

> Some transfers of authority between government officials . . . clearly have a direct relationship to voting if they concern authority over voting procedures, such as a change in who has authority to adopt a redistricting plan, conduct voter registration, or select polling place officials. *See, e.g.*, *Foreman v. Dallas County*, 521 U.S. 979 (1997).

Department of Justice, *About Section 5 of the Voting Rights Act*, "Section 5 Requirements," <http://www.usdoj.gov/crt/voting/sec_5/types.htm>. Although *Foreman* did not involve redistricting, it illustrates the importance of federal review of a change in decisonmakers. By using "party-affiliation formulas of one sort or another," Dallas County had changed its procedures for selecting election judges, "who supervised voting at the polls on election days," 521 U.S. at 980. Obviously, each election judge exercises a substantial amount of discretion in making decisions on election days; § 5 requires federal review of the procedures for selecting those judges so as to minimize the likelihood that they will exercise their discretion in a discriminatory fashion. So, too, state officials exercise a tremendous amount of discretion in adopting redistricting plans; it is equally important for federal officials to consider whether individual judges are more likely than the Mississippi Legislature to exercise that discretion in a discriminatory fashion.

The principle embodied in 28 C.F.R. § 51.15(b)(1) is fully consistent with this Court's decision in *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992). There, this Court held, "Changes which affect only the distribution of power among officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting." *Id.*, at 506. The Court, however, continued:

> To be sure, reasonable minds may differ as to whether some particular changes in the law of a covered jurisdiction should be classified as changes in rules governing voting. . . . When the Attorney General makes a reasonable argument that a contested change should be classified as a change in a rule governing voting, we can defer to that judgment.

Id., at 509. As indicated from his public pronouncements and from the February 14 letter to General Moore, the Attorney General continues to believe that a reassignment of redistricting authority "should be classified as a change in a rule governing voting." *Id.* While not binding, his judgment is one to which this Court may reasonably defer, as it did in *Foreman*.[23] *See also United States v. Louisiana*, 952 F. Supp. 1151, 1165-68 (W.D. La.) (*Presley* does not foreclose Attorney General's determination that a city court is a subunit of a city under 28 C.F.R. § 51.13(e)), *aff'd mem.*, 521 U.S. 1101 (1997).

[23] The dissent in *Presley* identified several transfers of authority which had been found subject to § 5, including "a transfer of voter registration duties from the county clerk to the county tax assessor." *Id.*, at 512 n.3 (Stevens, J., dissenting), quoting Brief for United States as *Amicus Curiae* 16 n.6. Likewise, in *County Council of Sumter County v. United States*, 555 F. Supp. 694 (D.D.C. 1983), the Attorney General had approved a South Carolina statute transferring the bulk of local decisionmaking authority, including the authority to select a form of government and to establish election districts, from the state to the county. The three-judge court unanimously agreed that "the shift of power from the Governor and the General Assembly to the new County Council" constituted a change affecting voting. *Id.*, at 702. This Court's opinion in *Presley* did not repudiate either of these precedents.

Deference to the Attorney General's judgment is unlikely to have the broad effects predicted by intervenors. Many state courts have litigated voting rights claims of various descriptions over the last four decades, but most such claims have arisen under federal law, not state law. Here, neither the District Court nor the Department of Justice decided that a state court must obtain preclearance under § 5 before adjudicating a federal claim. The much narrower principle actually established by this case will control only claims in state court arising under state law.

Intervenors, supported by their amici, complain that the Attorney General's judgment is entitled to no deference because he failed to question the jurisdiction of a state court in North Carolina adjudicating a challenge under state law to legislative redistricting under authority confirmed by that State's Supreme Court in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002). Plaintiffs and the Republican Executive Committee, of course, have no way of knowing why the Department of Justice considered the expansion of the Chancery Court's jurisdiction in Mississippi to be a change covered by § 5 without raising a similar question about the jurisdiction of the North Carolina court.[24] The answer may be as simple as the fact that Attorney General Moore in his submission letter of December 26, 2001, raised the question of whether *In re Mauldin* constituted a covered change, App. 227a-228a,

[24] Nor is this Court in a position to determine whether the Department's handling of the Mississippi submission constitutes "unwarranted administrative conduct," *Georgia v. United States*, *supra*, 411 U.S. at 541 n.13, in light of intervenors' failure to place before District Court anything resembling an administrative record. The public is encouraged to comment on submissions pursuant to 28 C.F.R. § 51.29, and, while some of those comments may be kept confidential, the Department has authority to release others under 28 C.F.R. § 51.36. The Mississippi Republican Executive Committee filed copies of its comments with the District Court, but intervenors submitted neither their own communications with the Department nor those of anyone else.

while Judge Jenkins's letter submitting the North Carolina redistricting plan raised no such issue of judicial authority. NAACP Brief at 3a-4a. Moreover, the District Court here held *In re Mauldin* to constitute a change within the scope of § 5 on January 15, 2002, App. 97a, while none of the opinions in *Stephenson* offered any suggestion of a departure from prior North Carolina practice. Indeed, so far as appears from the record, no one called to the Department's attention the possibility that the assumption of jurisdiction by the North Carolina courts might require approval under § 5.

Even if the Department was aware of the potential issue, it may be that no inquiry was made for the simple reason that the State of North Carolina, unlike the State of Mississippi, is not a jurisdiction covered by § 5 of the Voting Rights Act; rather, 40 of its individual counties are covered jurisdictions subject to § 5. *Stephenson*, *supra*, 562 S.E.2d at 385. The Department's regulations require a change to be submitted by "the jurisdiction that has enacted or seeks to administer the change." 28 C.F.R. § 51.10. The premise of intervenors' argument is that North Carolina enacted a change when its Supreme Court "authorized the courts to adopt a statewide redistricting plan," Appellants' Brief at 42, but North Carolina is not a jurisdiction which must submit its enactments under § 5 and the governing regulations. Rather, it is the covered county which "seeks to administer the change," although 28 C.F.R. § 51.23(a) permits a submission to be made on a county's behalf by a state officer like Judge Jenkins. The only change which the covered North Carolina counties seek to administer is the final redistricting plan itself, not the process by which it was adopted. Whether or not these distinctions between Mississippi and North Carolina are ultimately persuasive, they are weighty enough that it cannot be said that the North Carolina preclearance "proves that the Department was disingenuous in delaying

[the Mississippi] preclearance decision on that basis." Appellants' Brief at 41.[25]

Because *In re Mauldin* falls within the plain language of 28 C.F.R. § 51.15(b)(1), and because intervenors have shown no reason to disregard the determination of the District Court and the Department of Justice, this Court should conclude that preclearance of the decision of the Supreme Court of Mississippi is required under § 5.

2. The Chancery Court's unexplained disregard of the at-large election requirement of Miss. Code Ann. § 23-15-1039 is a voting change.

The Mississippi Legislature, in § 23-15-1039, has provided a rule for conducting elections whenever it fails to adopt a redistricting plan after a change in the size of the delegation. The applicable language provides that, "if the number of representatives shall be diminished, then the whole number shall be chosen by the electors of the state at large." In ordering its own redistricting plan into place, the Chancery Court simply ignored this statute. It did not find the at-large mandate to be unconstitutional or inapplicable; it simply failed to address it at all.

The District Court, by contrast, held that the Chancery Court's disregard of § 23-15-1039 constituted a change from prior Mississippi law. The Court unequivocally stated that "the Chancery Court's judgment adopting a congressional redistricting plan is a change . . . from the at-large plan set forth in Miss. Code Ann. § 23-15-1039 for

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[25] Still less can it be said that "political motives seem to be the only rational explanation for the difference in treatment," Appellants' Brief at 44, between the request here for additional information on February 14, 2002, and the approval of submissions from other states. Given the complex issues presented by the three separate changes encompassed by General Moore's submission, the Department did well to formulate a response as quickly as it did.

circumstances such as the present ones." App. 98a. In its letter to General Moore of February 14, the Department of Justice implicitly recognized that a change had been made. With regard to the reassignment of redistricting power to the Chancery Courts, the letter requested, "Please explain the State's view of the relationship between this change in voting procedure and Miss. Code Annot. 23-15-1039." App. 193a-194a.

Intervenors' contention that the District Court and the Justice Department misunderstood the statute is purest sophistry. Noting the statute's application to elections held "before the districts shall have been changed to conform to the new apportionment," intervenors contend that the districts changed "[o]nce the state court adopted a plan," Appellants' Brief at 38, thus removing the precondition for the application of the statute. Of course, changes in Mississippi districts "are not now and will not be effective as laws until and unless cleared pursuant to § 5." *Connor v. Waller*, 421 U.S. 656 (1975). Had the Chancery Court accepted intervenors' construction of § 23-15-1039, it should still have instructed state officials to conduct at-large elections until such time as a redistricting plan had been properly approved.

The District Court construed § 23-15-1039 according to its plain meaning and found that the enforcement of intervenors' plan would constitute a change from that meaning. Intervenors offer no good reason for this Court to reject the District Court's common-sense reading of the statute. For this Court to accept their fanciful construction of the statute would violate its ordinary procedures. "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Regents of University of Michigan*, *supra*, 474 U.S. 224 n.10, quoting *Propper v. Clark*, 337 U.S. 472, 486-87 (1949), and citing cases. *Accord*, *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000). Although the District Court's judgment has not had the benefit of review by the Court of Appeals, it is

noteworthy that all three judges accepted this reading of Mississippi law.

It beggars belief to suppose that the Mississippi Legislature intended § 23-15-1039 to apply only when a court had failed to redistrict the state. The statute in its present form goes back at least as far as the first code following the adoption of Mississippi's present Constitution of 1890. 1892 Miss. Code § 3690. At that time there was no precedent whatsoever for the drawing of congressional districts by a court. Mississippi's rejection of such a practice was confirmed in *Brumfield* and *Wood*, *supra*, which remained good law until *In re Mauldin*.

Nor is there any basis for intervenors' contention, Appellants' Brief at 38-39, that *In re Mauldin* authoritatively adopted their construction of § 23-15-1039. The Supreme Court merely declared that "[a]ny redistricting plan adopted by the chancery court . . . will remain in effect," pending further action by the Legislature. App. 111a. It did not order the Chancery Court to adopt a plan at all, much less to disregard the plan specified by § 23-15-1039. In any event, the District Court was fully aware of *In re Mauldin* when it rejected the construction of § 23-15-1039 put forward by intervenors.

For these reasons, the District Court properly concluded that enforcement of intervenors' redistricting plan would constitute a change from the law prescribed by § 23-15-1039.

B. The District Court properly agreed with the Department of Justice that consideration of intervenors' congressional redistricting plan was inappropriate under 28 C.F.R. § 51.35.

The Attorney General is obliged under § 5 of the Voting Rights Act to consider changes in election law properly submitted by state authorities. All parties recognize that the Attorney General's power to prescribe reasonable regulations to govern that process was confirmed by this Court in *Georgia v. United States*, *supra*. Intervenors nevertheless

contend that the application of those regulations by the Department of Justice in this case was so arbitrary and unnecessary that their congressional redistricting plan became effective 60 days after General Moore submitted it. Intervenors are wrong.

The regulations quite reasonably describe the sorts of changes which may be submitted for consideration, as well as the time of proper submission. In 28 C.F.R. § 51.35, the regulations provide for the disposition of improper submissions. The Department's letter of February 14 invoked this provision in refusing to consider appellants' redistricting plan:

> Because the December 13, 2001 Order of the Mississippi Supreme Court (In re Mauldin No. 2081-M-01891), and the December 21 & 31, 2001 Orders of the Chancery Court which adopted a redistricting plan, are directly related, it would be inappropriate for the Attorney General to make a determination concerning the congressional redistricting plan adopted by the Chancery Court. See 28 C.F.R. 51.22(b); 51.35.

App. 192a. The former provision mentioned in the letter concerns premature submissions, which it defines to include "[a]ny proposed change which has a direct bearing on another change affecting voting which has not received section 5 preclearance." 28 C.F.R. § 51.22(b). In other words, because the Chancery Court's authority to impose a redistricting plan had not yet received preclearance under § 5, it was premature for the state to submit for consideration the plan which the Chancery Court had adopted.

There is nothing arbitrary or improper about the Department's application of its regulations in this case. The District Court approved the Department's finding that it could not "make a determination considering the Chancery Court plan until it receives the requested information and makes a decision on whether to approve the assignment of

jurisdiction to the Chancery Court." App. 33a n.3.[26] Until the Attorney General approves the Chancery Court's assumption of jurisdiction, the Chancery Court's approval of intervenors' plan carries no more weight than the approval by intervenors themselves.

In attacking the Department's February 14 request for information regarding the effect of *In re Mauldin*, intervenors fail to carry the heavy burden of showing that the Department has engaged in "unwarranted administrative conduct," as described in *Georgia v. United States*, 411 U.S. at 541 n.13. Indeed, they do nothing more than restate their earlier objections that *In re Mauldin* should not be considered a change in the first place. If reassignment of electoral authority among state officials can ever be subject to § 5, as *Foreman* holds, then it can hardly be frivolous for the Department to investigate the possible consequences of that reassignment. Indeed, because a determination by the Department that *In re Mauldin* constitutes a covered change would not be subject to judicial review by the District Court, *Morris v. Gressette*, 432 U.S. 491, 506-07 & n.24 (1977),[27] that Court was in no position to determine whether its questions related to that issue could be unwarranted.

Intervenors' argument is based upon their misreading of *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000). That case does not hold that all submissions must be

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[26] For that reason, it is hardly surprising that, as intervenors' amici complain in Part E of their brief, the Department's questions did not mirror its published guidelines on redistricting. The Department was reviewing the change in the Chancery Court's jurisdiction, not the redistricting plan itself.

[27] Apparently, in an enforcement action brought by the Attorney General under § 12(d) of the Act, 42 U.S.C. § 1973j(d), a covered jurisdiction may defend on the basis that the challenged practices do not constitute covered changes under § 5. *Georgia v. United States*, *supra*, 411 U.S. at 531-35. There appears to be no reported case in which a private litigant has been permitted to challenge the Department's determination that a change is covered by § 5.

approved where no retrogression, actual or intended, is shown; the holding is limited to "§ 5 in its application to vote-dilution claims." *Id.*, at 328. Retrogression is the touchstone for evaluating intervenors' redistricting plan, but it is not the sole consideration in reviewing the reassignment of redistricting authority effected by *In re Mauldin*.

As noted above, reassignments of electoral authority are important because election officials exercise discretion. Intervenors are certainly correct that retrogression can be forestalled by § 5 review of the redistricting plan itself. However, in any redistricting process, there are many potential plans which do not constitute retrogression. The selection among those plans is an exercise of discretion, and that discretion can be exercised in a discriminatory fashion. Where redistricting authority is reassigned, § 5 review is necessary to assure that the reassignment does not make discrimination more likely in the exercise of that discretion. All of the Department's questions in its February 14 letter are plainly directed toward that end.[28]

Finally, even if this Court were to accept intervenors' contention that the February 14 letter was insufficient to toll the running of the 60-day period, the only effect would be the approval of *In re Mauldin*. The time for consideration of intervenors' redistricting plan itself was not tolled; it never started. The Department's declaration, approved by the District Court, was that the submission of the plan was premature under § 51.22(b) until *In re Mauldin* had been approved. If intervenors are correct that *In re Mauldin* has

[28] In *Garcia v. Uvalde County*, 455 F. Supp. 101 (W.D.Tex. 1978), *aff'd mem.*, 439 U.S. 1059 (1979), upon which intervenors' amici rely, the District Court did not hold that the Attorney General's questions were insufficient to toll the running of the 60 days. Rather, the Court construed the regulations as precluding tolling more than once by the submission of successive requests for information. 455 F. Supp. at 105. Here, the Department submitted only a single request for additional information.

now been approved by operation of law, then the consideration of their redistricting plan may begin. The District Court was plainly correct in concluding, App. 33a-34a & n.3, that the plan had not gone into effect.

C. The Department's April 1 letter properly found that consideration of any submission was premature.

Intervenors are wrong in contending that the Department's failure to object within 60 days after submission of General Moore's second letter on February 19, 2002, App. 201a, constitutes the approval necessary under § 5. Long before the 60 days had expired, the Department responded once again to his submission. The Department's letter of April 1, 2002, again found the submission to be premature:

> Where voting changes submitted by the State have been enjoined by a federal court, they are presently incapable of administration, and are not ripe for review by the Attorney General. Accordingly, it would be inappropriate for the Attorney General to make a determination concerning your submission now. *See Procedures for the Administration of Section 5* (28 C.F.R. 51.22(a), 51.35).

J.App. 29. General Moore has never contested the Department's finding that the submission is premature. Although this Court has acknowledged the possibility that the Attorney General's refusal to consider a submission might be invalid where "unwarranted administrative conduct may be shown," *Georgia v. United States*, *supra*, 411 U.S. at 541 n.13, no case has ever overridden the Attorney General's judgment in that regard. At no point in their brief do intervenors acknowledge the heavy burden they must bear.

Instead, they invoke the language of § 5, declaring, "The State of Mississippi, whose courts have ordered implementation of the state court plan, clearly has 'enact[ed] or seek[s] to administer' that plan." Appellants'

Brief at 30. But the words of § 5 simply will not bear the meaning intervenors ascribe to them. In Mississippi only the Legislature may "enact" law. Miss. Const. Art. 4, § 33 (1890). Certainly, the Chancery Court did not "seek to administer" a congressional redistricting plan; it ordered Governor Musgrove, General Moore, and Secretary Clark to do that.[29] However, there is no indication from the record that these three defendants still "seek to administer" intervenors' congressional redistricting plan. They certainly do not "seek to administer" that plan now, in the face of the District Court injunction to the contrary, which none of the official defendants have appealed. The Department's April 1 letter told them that this Court's injunction placed them outside the reach of § 5, because the submitted changes "are not presently capable of administration." Under the unusual circumstances of this case, the Department's application of § 5 and its implementing regulations can hardly be considered to be "unwarranted administrative conduct." *Georgia v. United States*, *supra*, 411 U.S. at 541 n.13.[30]

It is important to note that General Moore and his colleagues no longer claim that they "seek to administer"

[29] It is when state officials "seek to administer" a court order that their efforts require approval under § 5. In *Hathorn v. Lovorn*, 457 U.S. at 257, this Court considered the "implementation of a change in election procedures." Thus, it is not the "enactment" of a court order, but its "implementation" which brings it within the language of § 5.

[30] As the Court can easily see, intervenors have taken out of context the pronouncement that "compliance with § 5 is measured solely by the *absence*, for whatever reason of a timely objection on the part of the Attorney General." *Morris v. Gressette*, *supra*, 432 U.S. at 502 (emphasis in original). There, the South Carolina redistricting plan for its state Senate had unquestionably been properly submitted, and the Attorney General had affirmatively declared "that he would not interpose an objection to the new plan." *Id.*, at 497. *Morris* simply held that the propriety of that approval was not subject to further judicial review. *Id.*, at 507. Neither *Morris* nor any other case reviews the propriety of the Attorney General's explicit judgment that a submission may not be properly considered.

intervenors' redistricting plan. They did not take issue with the Justice Department's finding in its April 1 letter that the plan could not be administered. If they had continued to "seek to administer" the plan, the law would have given them at least two options. First, they could have asked the Justice Department through administrative means to reverse its determination and to proceed with consideration of the plan. Second, they could always file suit in the District Court for the District of Columbia to seek approval, as § 5 permits. Thus, the Department's determination that the plan had not been properly submitted will not lead to an unreviewable and permanent blockade of state policy.

To accept intervenors' contrary position, however, could lead to real difficulties. Congress intended for all voting changes to have the careful consideration of the District Court in the District of Columbia or of the Attorney General before taking effect. Here, the Attorney General has refused to review a change in election law, and state authorities have acquiesced in that determination. To permit private citizens to appear in court after the sixtieth day to seek a declaration of approval could frustrate the congressional mandate for careful review and place a potentially pernicious plan into effect.[31] Whatever the merits of this plan, this Court should not encourage such a contravention of established procedures.

Because intervenors have not shown the April 4 letter to be an improper application of § 5 and its implementing

[31] Indeed, it seems unlikely that intervenors would have standing as plaintiffs to seek a declaration that § 5 has been satisfied. In *Allen*, this Court acknowledged private "standing to obtain an injunction against further enforcement, pending the State's submission of the legislation pursuant to § 5." 393 U.S. at 555. There appears to be no precedent where this Court has allowed a private party to seek an injunction requiring enforcement of a change that has been approved under § 5. Where the official defendants actually subject to the District Court's injunction do not dispute its resolution of the § 5 issue, there is no good reason to allow intervenors to do so.

regulations, the District Court properly denied their motion.

CONCLUSION

For the reasons stated by plaintiffs and the Mississippi Republican Executive Committee in the Brief of Cross-Appellants in *Smith v. Branch*, No. 01-1596, this Court should reverse the judgment of the District Court and remand for entry of a judgment requiring the defendants to conduct elections for Mississippi's Representatives in accordance with 2 U.S.C. § 2a(c)(5). In the alternative, for the reasons stated herein, the judgment of the District Court should be affirmed.

Respectfully submitted,

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BEATRICE BRANCH, *et al.*,

Appellants,

v.

JOHN ROBERT SMITH, *et al.*,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

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Despite the holding in *Growe v. Emison*, 507 U.S. 25, 34 (1993) that state courts are "prefer[red] . . . to federal courts as agents of reapportionment," the Department of Justice delayed preclearance of the state court plan in this case beyond the statutory sixty day deadline. This in turn prompted the District Court to enjoin the plan for a failure to preclear. The District Court also held that the federal constitution deprives the Mississippi courts of any authority over congressional redistricting. This in turn prompted the Department to delay preclearance beyond a second sixty day period for an inability to implement the plan. The Department said no decision will be made until this Court reverses the constitutional ruling.

No party defends the District Court's constitutional analysis. The appellees instead rely upon the untenable theory that state courts have no authority in this situation to enforce federal law under the Supremacy Clause of Article VI unless a federal law claim is written in the complaint. The appellees and the United States argue that the Attorney General could unilaterally postpone the second sixty day period because of the District Court's constitutional ruling. They also claim he could unilaterally postpone the first sixty day period regarding the redistricting plan to request information about the Mississippi Supreme Court's decision in *In Re Mauldin*, No. 2000-M-01891 (Miss. Dec. 13, 2001), even though he does not contend in this Court that *In Re Mauldin* is a voting change for which a preclearance submission is required. These matters are addressed in turn.

I. THE FEDERAL CONSTITUTION DOES NOT PREVENT THE MISSISSIPPI COURTS FROM ADOPTING A CONGRESSIONAL REDISTRICTING PLAN WHEN THE LEGISLATURE DEFAULTS.

As an initial matter, the United States, as *amicus curiae*, suggests the District Court may have erred by deciding the constitutional question prior to any preclearance of the state court plan under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. (Br. 13-14). Although we disagree with the District

Court's ruling, we do not believe the court was required to await preclearance before announcing it.

In *Connor v. Waller*, 421 U.S. 656 (1975), and *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 646-47 (1977), the federal district courts had allowed elections to go forward under plans not formally submitted for preclearance by concluding that the plans did not violate the constitutional ban on race discrimination. This Court reversed, holding that preclearance was required before the plans could be utilized, and indicating that the courts should not have addressed that constitutional question until the plans were precleared.[1]

The present case is different. The District Court here did not substitute constitutional analysis for the preclearance process in order to utilize an unprecleared plan. Instead, the District Court enjoined the state court plan because of the purported absence of preclearance and issued the constitutional ruling as "an alternative holding" so that "the Supreme Court [will] have before it the case as a whole, instead of truncated sub-parts." J.S. App. 5a. If this Court vacates the constitutional ruling without review on the merits, the District Court will simply reinstate it once the plan is declared precleared, after which a new appeal will be necessary. This likely will take the case into the 2004 election cycle before the constitutional authority of the Mississippi courts is resolved. Neither *Connor* nor *Warren County* involved such a situation. Whatever the benefits of delaying constitutional review in those cases, delay here will frustrate the prompt resolution of an already protracted process.

Turning to the merits, no party before this Court defends the District Court's wholesale disqualification of state courts

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[1] The United States also cites *Wise v. Lipscomb*, 437 U.S. 535 (1978) and *Connor v. Finch*, 431 U.S. 407 (1977) on this point. (Br. 13). But those cases simply repeat the holdings of *Connor v. Waller* and *Warren County* without actually addressing comparable situations.

from participating in the congressional redistricting process pursuant to their general equitable jurisdiction. The appellees (br. 24) and the Jubelirer *amici* (br. 3) concede that the Supremacy Clause of Article VI authorizes courts to adopt congressional redistricting plans in the wake of post-census legislative inaction notwithstanding Article I, § 4. Not only may this be done by federal courts, they admit, but also by state courts so long as a federal claim is written into the complaint. But if the complaint does not mention federal law, they say the federal constitution bars state courts from any role in congressional redistricting.

A state court's authority under the Supremacy Clause to ensure compliance with federal law exists in every case, however, regardless of the nature of the plaintiff's complaint. In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), the plaintiff brought a state law action in ejectment. Federal law issues were implicated, however, because the property in dispute was affected by federal treaties. In his opinion for the Court, Justice Story said the Supremacy Clause obligated state judges to decide such a case "not . . . merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States." *Id.* at 340-41. He explained that the framers contemplated that "cases within the judicial cognizance of the United States . . . would arise in the state courts in the exercise of their ordinary jurisdiction," and that "state courts will incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States." *Id.* at 340, 342. He set forth examples of ways in which state courts would be required to enforce federal law even if it was not raised in the state court complaint. *Id.* at 341-42.

In *Hathorn v. Lovorn*, 457 U.S. 255, 258 (1982), the Mississippi chancery court complaint contained only state law claims and the federal voting rights issue was first raised in a petition for rehearing on appeal. This Court nevertheless held

that the state courts "had the power"and "also . . . the duty" to resolve the case according to federal law. *Id.* at 269-70.

Like the property in *Martin v. Hunter's Lessee*, congressional redistricting after a post-census legislative default implicates federal law. The federal constitution is violated because of the unequal populations of the old districts as reflected by the new census data. In addition, if the state loses or gains a seat, the prior plan will have the wrong number of districts under federal law. State courts, like federal courts, have the authority to rectify these violations. As in *Martin* and *Hathorn*, the state court's authority to act under the Supremacy Clause is not dependent upon the inclusion of a federal claim in the complaint. Given this, and given that the Supremacy Clause allows state courts to enforce federal law regarding congressional districts notwithstanding Art. I, § 4, there is no basis for the constitutional distinction the appellees draw. While the content of the complaint may affect whether the case can be removed to federal court, it does not limit the obligation of state courts under the Supremacy Clause to enforce federal law — in this instance, by adopting a new plan that contained the proper number of districts and satisfied the equal population requirements of Art. I, § 2. *See* J.S. App. 120a-124a (Chancery Court findings regarding the validity of the various redistricting proposals under federal law).

The appellees complain that this Court's review of state court-ordered plans will be limited to compliance with federal law inasmuch as the Court has no supervisory jurisdiction over equitable remedial factors developed by state rather than federal judges. (Br. 23-24). However, that limitation exists whether federal claims are in the state court complaint or not. The scope of review of state court plans is different from federal plans

because of the difference between state and federal courts, not the nature of the state court complaint.[2]

As their next line of defense, the appellees argue there was no federal constitutional violation to cure in the first place because Miss. Code Ann. § 23-15-1039 requires at-large elections in this situation, leaving no basis to act under the Supremacy Clause since at-large elections comply with the equal population principle of Art. I, § 2.[3]

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[2] The appellees say that the Chancery Court's effort to be fair to both incumbents thrown together by the loss of a seat, and to the voters that supported each of them, would be forbidden to a federal court. (Br. 23). That is inaccurate. *See Hastert v. State Board of Elections*, 777 F. Supp. 634, 655 (N.D. Ill. 1991); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688-89 (D. Ariz. 1992), *aff'd*, 507 U.S. 981 (1993). Even if prudential considerations adopted by federal courts did preclude this sort of fairness, nothing prevents a state court from designing a plan that ameliorates the loss of a seat by creating a balanced district between the two incumbents who must run against each other. Indeed, this seems a sensible way to solve a difficult problem.

[3] The appellees say the state court plaintiffs "did not challenge the two applicable Mississippi statutes under either federal or state law." (Br. 29-30). That is not accurate. As for the statute containing the pre-existing five-district plan, everyone knew it complied with neither federal nor state law, state officials did not intend to use it, and the appellees concede it was unlawful. (Br. 25). While the state court complaint did not specifically name that statute, the complaint said a new plan was required. J.A. 14-15. No one responded by saying the old statute could be used. As for Miss. Code Ann. § 23-15-1039, it too was not mentioned in the complaint, but once the state court intervenors claimed it mandated at-large elections, the state court plaintiffs argued that it did not apply and that at-large voting would violate federal and state law. J.A. 18-21. Although the appellees call the state court complaint "peculiar" (br. 26), the Mississippi Supreme Court rejected the contention that it insufficiently stated a claim upon which relief could be granted. Petition for Writ of Prohibition, *In Re Mauldin*, No. 2000-M-01891 (Miss.), pp. 6-8 (copies have been lodged with the Clerk); J.S. App. 111a (Mississippi Supreme Court order stating "the request to dismiss the Plaintiff's Amended Complaint is denied.")

Again, this was not the District Court's reasoning. Moreover, as stated in the Section 5 discussion in our opening brief (pp. 37-39), Miss. Code Ann. § 23-15-1033 requires the election of congressional Representatives "by districts." § 1039 envisions at-large voting only if the election is held "before the districts shall have changed to conform to the new apportionment," thus making it clear that districts are to be used absent an emergency. If a state court, exercising its equitable power in the wake of a legislative default, adopts a proper plan, the districts will have been "changed to conform to the new apportionment" and § 1039 is satisfied.

The appellees deride this reading of Mississippi law as "fanciful." As stated in our opening brief (p. 39), their position was rejected by the Mississippi Supreme Court in *In Re Mauldin*, J.S. App. 110a-112a. While the appellees refer to the Federal District Court's agreement with them on this issue (br. 42) , the state supreme court has the last word in interpreting state law.

Further, the appellees do not explain why this reading is fanciful except to say the 1892 legislature that adopted a prior version of § 1039 would not have anticipated court-ordered election plans. (Br. 43). But the language of § 1039 says nothing about who can draw the districts, and does not pretend to forever restrict the task to those who drew them in 1892. If the Mississippi legislature turned over the responsibility of designing districts to a commission, § 1039 would not require at-large elections in lieu of the commission's districts simply because the 1892 legislature did not anticipate commissions.

Finally, even if § 1039 requires at-large elections in this situation, it is superseded by federal law, which requires districts. This is discussed in the briefs in no. 01-1596. Someone had to draw a new plan. The federal constitution does not banish the courts of Mississippi from this process.

II. THE STATE COURT PLAN WAS PRECLEARED.

A. The State Court Plan Was Precleared by Passage of the Second Sixty Day Statutory Period.

On April 23, 2002, after the appeal in this case was filed, the second sixty day period under Section 5 expired. The appellants then filed a motion in the District Court to declare the plan precleared for that reason and promptly informed this Court by way of a supplemental brief pursuant to Rule 18.10. The District Court denied the motion on June 3 and this Court noted probable jurisdiction of the appeal one week later. The appellees now contend this Court has no jurisdiction to resolve the issue about the second sixty day period because no notice of appeal was filed from the June 3 ruling.

But this Court's authority to adjudicate the matter is not dependent on anything the District Court did. The District Court entered no new judgment and made no change to the injunction previously granted on February 26. As appellants, we simply contend that, because of the post-February 26 developments, the state court plan is now unquestionably precleared, the February 26 injunction is no longer supportable on Section 5 grounds, and the Section 5 issue is moot. Alerting the Court to this is no different than informing the Court in the event the Attorney General mailed a letter affirmatively preclearing the plan. This Court certainly may consider intervening events in resolving the existing appeal of the February 26 judgment. *See Tiverton Board of License Commissioners v. Pastore*, 469 U.S. 238, 240 (1985) ("counsel . . . have a 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation"(internal citation omitted)).

There is no requirement that these developments first be brought to the attention of the lower court. As the United States recognizes (br. 9 n.1), questions of mootness may be raised at any time and a second notice of appeal therefore was

unnecessary. Although not required to do so, the appellants presented this issue to the District Court as a matter of efficiency. The fact that the District Court already has reviewed the question simply means this Court need not remand the case in the event it wishes the District Court to pass on it first. This Court's jurisdiction to review the events since the February 26 judgment is not dependent upon a second notice of appeal.

According to the United States and the appellees, no preclearance occurred on April 23 because the State of Mississippi did not "enact" a redistricting plan and its officials no longer "seek to administer" it (to use the words of Section 5). The United States quotes the definition of "enact" in *Black's Law Dictionary* 546 (7th ed. 1999): "[t]o make into law by authoritative act; to pass." (Br. 10). Certainly, when a court adopts a redistricting plan, this is an authoritative act that "make[s]" the plan "into law" (subject, in this instance, to the preclearance requirement). This would seem to fit the definition.

Even if the plan was not "enact[ed]" for purposes of Section 5, the State of Mississippi clearly "seek[s] to administer" it. Although the state defendants did not file a separate appeal of the District Court's constitutional ruling, the United States is wrong in suggesting that this is akin to the repeal of a statute or the withdrawal of a submission. (Br. 11 n. 2). The Department of Justice did not take that position in its April 1, 2002 letter. Indeed, the Department could not have done so since the state defendants had until April 27 to appeal the February 26 judgment. 28 U.S.C. § 2101(b). In the April 1 letter, the Department took note of the appeal filed by the Branch federal intervenors, and said: "If the injunction against implementation of these changes is lifted, upon notification, the Attorney General will again consider these changes for preclearance unless the state notifies us of its intent to alter them." J.A. 29. The Department did not consider this submission to have been withdrawn and did not say that the state defendants must file a

separate appeal in order for the State to continue to "seek to administer" the plan.

In addition, the second sixty day period ended on April 23, four days before the appeal time expired. By definition, the absence of a timely appeal by the state defendants could not suspend that particular sixty day period. The plan was precleared before it could be said that the state defendants had declined to file a timely appeal.

Moreover, the state defendants knew that the Branch federal intervenors had appealed the District Court's ruling and that the propriety of the constitutional injunction would be reviewed by this Court. There was no need for them to institute a separate appeal. Whether the Department is justified in declining to make a preclearance decision when no one appeals and the constitutional injunction will forever remain intact, that is not the situation here. The state defendants chose not to participate in either the state or federal court trials. It is no surprise, then, that they did not file an appeal. Congressional redistricting battles carry intensely partisan overtones, and state officials may occasionally prefer to stay away from the fray. Appellate review will sometimes be secured by parties other than the public officials who are named in the case. *See, Abrams v. Johnson*, 521 U.S. 74, 78 (1997) (private intervenors appealed validity of federal court-ordered congressional plan even though state defendants not only declined to appeal the plan, but actually defended it).

That does not alter the status of a redistricting plan under Section 5. This is particularly true where, as here, the state defendants are in the case in their ministerial capacities as members of the State Board of Election Commissioners. The state court plan was adopted by the Chancery Court consistent with the order of the Mississippi Supreme Court in *In Re Mauldin*. The Mississippi Attorney General submitted it for preclearance in his ministerial capacity and in obedience to the

Chancery Court order. *See Hathorn*, 457 U.S. at 270 n.24 (recognizing authority of a state court to order the parties to submit a plan for preclearance). This is not a plan for which the state defendants are responsible and they have no power to change, override, or withdraw it.

Next, the United States turns to the language of Section 5 providing that a voting change "may be enforced" if precleared, and suggests that preclearance is precluded where other obstacles to enforcement exist. (Br. 14-15). However, those words from the statute indicate only that once preclearance is achieved, Section 5 is no longer a barrier to enforcement. They have never been interpreted to mean that all non-Section 5 obstacles must first be eliminated. *See Morris v. Gressette*, 432 U.S. 491, 505 (1977) ("the Attorney General's failure to object is not conclusive with respect to the constitutionality of the submitted state legislation.") The purpose of the sixty day rule is to remove Section 5 as a barrier to non-retrogressive changes within a short period of time. There may be other obstacles — including pre-preclearance and post-preclearance constitutional injunctions — but those do not detract from the importance of removing the Section 5 barrier within "the period specified in the statute." *Id.* at 504.

Contrary to the fears of the United States (br. 15), enforcement of the sixty day deadline absent an exception for constitutional injunctions will not hamper the administration of Section 5. As it is now, the Attorney General sometimes reviews and preclears plans that later are enjoined on other grounds. It will be no more wasteful, and the "benchmark" analysis will be no more complicated, if the Attorney General occasionally preclears a plan that previously was enjoined, and the injunction is later upheld on appeal. The United States acknowledges that situations like this are very rare. (Br. 14). The burden is therefore small. On the other hand, jurisdictions like Mississippi, already enduring the delay involved while the constitutional

injunction is reversed, should not be saddled with further delay by a Justice Department suspension of the statutory period.

Although the appellees refer to the Department's "application of § 5 and its implementing regulations"(br. 48, 49-50), there is no regulation allowing the Attorney General to suspend the sixty day period on the basis of a constitutional injunction. The United States refers obliquely to 28 C.F.R. 51.22(a), which precludes "premature submission[s]" (br. 14), and the appellees say that the April 1 letter concluded the submission was premature. (Br. 47). But the plan was not "premature" when submitted on December 26, 2001. The Mississippi Supreme Court had already held that "[a]ny congressional redistricting plan adopted by the chancery court . . . will remain in effect, subject to any . . . plan which may be timely adopted by the Legislature." *In Re Mauldin*, J.S. App. 111a. To the extent the United States' reference to § 51.22(a) implies some notion of retroactive prematurity, there is no basis for that unusual concept in the regulations, much less the language of the statute.

Section 5 provides that when a state "enact[s] or seek[s] to administer" a voting change, the change is precleared if it "has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission." While the District Court's constitutional ruling may have prevented Mississippi from "administer[ing]" the state court plan, it did not change the fact that the State "enact[ed] or *seek[s]* to administer" the plan and that its officials will be ready to administer the plan once the injunction is lifted. Because there is no exception to the sixty day rule for constitutional injunctions, the plan has been precleared.

B. The State Court Plan Was Precleared by Passage of the First Sixty Day Statutory Period.

1. The Decision of the Supreme Court of Mississippi in *In Re Mauldin* Is Not a Voting Change.

When a covered jurisdiction institutes a voting change, it must obtain federal preclearance by demonstrating that the change does not have a racially retrogressive intent or effect. This can be done either by pursuing a declaratory judgment action in federal district court in the District of Columbia or submitting the change to the Attorney General for administrative preclearance. A decision by the Attorney General to grant or deny preclearance is not reviewable in a local federal district court. *Morris v. Gressette*, 432 U.S. at 502-505 & n. 21. However, when private litigants like the Smith federal plaintiffs (appellees here) seek to enjoin the implementation of an allegedly unprecleared change, local federal courts are required to determine "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate." *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983).

The United States argues that the more-information request is a conditional determination that the jurisdiction has thus far failed to submit enough to carry its substantive burden under Section 5. Because this is akin to an explicit denial of administrative preclearance, says the United States, it is not subject to judicial review in local federal courts (Br. 18-20).

But here, the Attorney General never said the information was insufficient or the State had failed to carry its burden regarding the state court plan itself. In fact, the February 14 letter said "the Department is not formally seeking additional information regarding the redistricting plan." J.S. App. 195a. Instead, the letter referred specifically to the Mississippi Supreme

Court decision in *In Re Mauldin* and said "the information sent to date regarding *this change* is insufficient to enable us to determine that [it satisfies Section 5's substantive requirements]." J.S. App. 193a (emphasis added). If, however, *In Re Mauldin* itself is not a voting change covered by § 5, no information need be submitted about it in the first place and the Attorney General's determination that the information is insufficient makes no difference with respect to the preclearance of the plan.

As mentioned previously, the question of "whether a change was covered by § 5" is within the province of local federal courts and this Court on appeal. *City of Lockhart*, 460 U.S. at 129 n.3. At least on that point, this Court is not being asked (for purposes of this issue) to review the propriety of any substantive determination by the Attorney General about the insufficiency of the information regarding *In Re Mauldin*, but instead whether *In Re Mauldin* is subject to Section 5 at all. If not, the state court plan itself, about which no determination of insufficient information was made, has been precleared by passage of the sixty day calendar. Clearly, the local federal court, and this Court on appeal, can review this question and decide "whether § 5's approval requirements were satisfied," *City of Lockhart*, 460 U.S. at 129 n.3, by passage of the statutory sixty day period.[4]

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[4] The United States suggests there is no need for a judicial determination here because the State can file a declaratory judgment action in the District of Columbia if the Department takes too long to make a decision. (Br. 19). But that is an expensive and time-consuming prospect. Further, it is unnecessary if the plan has already been precleared through the passage of the sixty day period. The "statutorily prescribed 'rapid method'" of administrative preclearance, *Morris*, 432 U.S. at 504 n. 19 (citation omitted), is not vindicated by permitting the Department to postpone the statutory period at will and providing that the only recourse is an expenditure of the time and resources necessary to litigate in the District of Columbia.

The appellees ask this Court to defer to the position of the United States Attorney General that *In Re Mauldin* reflects a voting change. (Br. 39). But the Attorney General *does not take that position in this Court*. While the brief for the United States says that "the Attorney General may not preclear a districting plan if that plan was developed through a process that itself violated Section 5" (br. 24), the United States does not contend that the process here violated Section 5 or that the assumption of jurisdiction is a voting change.

Instead, the United States argues that the Department had a right to postpone the statutory sixty day period even if this Court "ultimately determines that the vesting of jurisdiction in the chancery court was not subject to preclearance." (Br. 26). According to the United States, the Department may unilaterally extend the sixty day period irrespective of "whether the State's initial submission was in fact complete," so long as "the Attorney General had any possible foundation for seeking more information." (Br. 25).

The foundation here, says the United States, stems from the fact that "[t]he submission in this case presented the Attorney General with the novel question of whether the assumption of jurisdiction to issue a remedial redistricting order was the sort of change 'with respect to voting' covered by Section 5." (Br. 26). Rather than answer that question and make a decision within sixty days of the submission, the Department requested more information — according to the United States' brief — in order to consider "whether the assumption of jurisdiction . . . [was] the invocation of a power that predated the Voting Rights Act" (br. 27) and also to consider "the discriminatory potential of such a change." (Br. 28). In short, says the United States, preclearance of the plan was delayed to decide if the assumption of jurisdiction "satisfied Section 5's standards without deciding whether it was subject to those standards." (Br. 28).

However, Section 5 does not authorize the Attorney General to extend the statutory period to give the Department extra time to make up its mind about "novel questions" or find a way to dodge them. If the assumption of jurisdiction is not a change "with respect to voting" subject to Section 5's standards, preclearance of it is not required and no information need be submitted about it. The sixty day statutory deadline is not so malleable that it can be expanded in order to request information that a state is not required to submit in the first place. *See, Morris v. Gressette*, 432 U.S. at 504 (the Section 5 process "was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission").[5]

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[5] Noting the District Court's view that this was a change, the United States contends that although the Attorney General is not bound by the District Court's view, any disagreement would have had "serious practical consequences" because the District Court might have enjoined the plan if the Attorney General precleared it without making a decision on the assumption of jurisdiction. (Br. 27). But the Department's failure to make a decision within sixty days guaranteed that the District Court would enjoin the plan, with the "serious practical consequence" of precluding the Mississippi state courts, who are "prefer[red] . . . to federal courts as agents of apportionment," *Growe v. Emison*, 507 U.S. 25, 34 (1993), from implementing their plan. If the Department had precleared the plan within sixty days and stated that the assumption of jurisdiction was not a change for which preclearance was required, the plan would have been enforceable and the District Court could not have enjoined the plan on Section 5 grounds. Even if the District Court had done so, there would have been a very simple issue for this Court to review on an emergency motion for stay. (As it was, this Court was faced in the motion for stay with a much more complicated situation where the plan itself was not precleared). In addition, the Department could have stated that the assumption of jurisdiction was not a voting change, but that even if it was, it was not racially discriminatory and therefore satisfied Section 5's substantive standards. Finally, the Department could have precleared the plan, stated that the assumption of jurisdiction was not a voting change, and nevertheless requested more information so that it could later make a preclearance decision on the assumption of jurisdiction out of an abundance of caution. Any of these

The question, then, is whether the assumption of jurisdiction was a voting change. The United States does not argue that it was, and its brief states that no one else has ever taken that position in the past: "This was the first time that any jurisdiction submitted a court's assumption of jurisdiction for preclearance and the first time any court has suggested that such a change might be covered by Section 5." (Br. 26 n.12). Moreover, no one has taken that position since this episode, as underscored by the Department's July, 2002 preclearance of the North Carolina state court plan for legislative elections.[6]

The United States says North Carolina is different because no one from North Carolina suggested that the decision in *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002), marked a change in the authority of state courts. Although the United States admits that the Attorney General attempts to identify changes requiring preclearance even when they are not submitted, it says the large volume of submissions necessarily focuses the Department's attention on those changes identified by the parties. (Br. 30 n.14). But the Department reviews only a small number of statewide plans each redistricting cycle, and an even smaller number of state court-ordered plans. In the wake of the very recent Mississippi experience, this issue plainly was on the Department's radar screen. It would seem the Department at least would have inquired as to whether the assumption of jurisdiction in North Carolina was a break with the past. A brief search would have uncovered *Leonard v. Maxwell*, 3 S.E.2d 316, 324 (N.C. 1939), which predates *Baker v. Carr*, 369 U.S. 186 (1962), and demonstrates that North Carolina is no different than Mississippi in this respect.

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alternatives was preferable to the Department's decision to delay implementation of the plan while it figured out what to do.

[6] The North Carolina preclearance letter was lodged by the NAACP *amici* with the Clerk. The submission letter is attached to their brief.

Moreover, the situation has now clearly been called to the Department's attention by the briefs in this case. Yet we are aware of no request by the Department that North Carolina submit the assumption of jurisdiction by the supreme court of that state for approval under Section 5.

Unlike the change in procedures for selecting election judges in *Foreman v. Dallas County*, 521 U.S. 979 (1997), which meant that one set of election of officials would be replaced by another, the assumption of jurisdiction by state courts does not involve a reassignment or transfer of redistricting authority from the legislature. The courts are simply exercising equitable authority they have always possessed even though they did not utilize it in redistricting matters before *Baker v. Carr*.

As illustrated by the examples in our opening brief (pp. 35-37), the flexibility and breadth inherent in the equitable powers of courts, and the evolution of precedent governing when and how courts assume jurisdiction, do not easily lend themselves to the before-and-after analysis involved in determining whether something is a voting change. Clearly, if a state court adopts a new redistricting plan, a change has occurred. But the decision of a court of equity to assume jurisdiction in a new or somewhat different type of case does not independently mark the sort of transformation in voting practices that Section 5 was designed to encompass.

The United States does not contend otherwise in this Court. Because there was no need to submit information about the assumption of jurisdiction in *In Re Mauldin*, the Department's request for more information about it did not restart the sixty day deadline on the redistricting plan.

2. The Use of Districts Is Not a Voting Change.

As noted in our opening brief (pp. 37-39) and earlier in this reply brief, the state court's adoption of a plan containing districts does not deviate from Miss. Code Ann. § 23-15-1039. Therefore, it is not a voting change for which the Department can

seek more information in order to postpone the sixty day deadline regarding the plan itself. Like the assumption of jurisdiction, the United States does not argue in this Court that this is a change, but instead contends the Department can postpone the sixty day deadline to request more information about it even if it is not a change. We have already addressed that argument.[7]

3. Even If These Are Voting Changes, the Attorney General Could Not Extend the Sixty Day Deadline When the Information Initially Provided Demonstrates These Matters Had Already "Been Submitted" for Section 5 Review.

According to the United States, the request for more information regarding *In Re Mauldin* and § 1039 was tantamount to a conclusion that the State provided insufficient information to meet its burden under Section 5, and local federal courts — and this Court on appeal — have no authority to second-guess that conclusion. (Br. 19-20). Earlier in this brief, we demonstrated that this makes no difference if these matters are not voting changes.

Even if they are voting changes, judicial examination is proper to determine whether the request for more information properly restarted the sixty day calendar. The February 14 letter was based not on a substantive conclusion that the State had failed to prove the absence of discrimination, but on a contention that the information was insufficient to make a decision either

[7] The United States is inaccurate when saying the Mississippi Attorney General indicated that the purported departure from § 1039 was a voting change. (Br. 27 n. 13). The Mississippi Attorney General merely said he was submitting that matter, as well as the assumption of jurisdiction, for review "to the extent" they constitute voting changes. J.S. App. 228a. He indicated that the submission of these items should not be viewed as a concession that they are covered by Section 5. J.S. App. 225a.

way. As stated in our opening brief (p. 43), the Attorney General may not restart the sixty day period unless the information initially submitted is so inadequate that the plan cannot be said to have "been submitted" (as that phrase is used in Section 5) in the first place. *See also Morris*, 432 U.S. at 504 n. 19 (the Attorney General has no authority to extend the deadline beyond the time "a complete submission has been pending . . . for 60 days"). Because the local federal court has the duty to determine "whether § 5's approval requirements have been satisfied," *City of Lockhart*, 460 U.S. at 129 n.3, it also has the duty to decide if the change (in the words of Section 5) "has been submitted . . . to the Attorney General and the Attorney General has not objected within sixty days after such submission."

Even employing the deferential review that the United States urges (br. 23), it is clear that *In Re Mauldin* had "been submitted" with the initial submission on December 26, 2001. All of the specific information that the Department requires in 28 C.F.R. 51.27 was provided at that time. Moreover, this was not a displacement of the legislature as the primary decisionmaker for congressional redistricting in Mississippi. There was no need for information to compare, for example, the racial composition of the state's judiciary with its legislature.

It has been clear since *Scott v. Germano*, 381 U.S. 407 (1965), that state court judges could adopt statewide redistricting plans. *Growe* reaffirmed this in 1993. It has been clear since *Hathorn v. Lovorn* in 1982 that voting changes ordered by state court judges in Section 5 jurisdictions are subject to preclearance. The notion of state trial judges adopting statewide plans is not something out of the blue that required more than sixty days to analyze under Section 5.

In all states, the decisions of trial judges exercising general equitable jurisdiction are subject to review by the state supreme court. *See, e.g., Perry v. Del Rio*, 67 S.W.2d 85 (Tex. 2001) (granting emergency review and overturning trial court order

adopting congressional plan). In the many states where trial judges are elected, they are chosen from local election districts whose demographics do not necessarily mirror those of the entire state. If this is somehow retrogressive in one state, it is retrogressive in all. Nothing about the demographics or venue provisions in Mississippi make it any different for retrogression purposes from Louisiana or Alabama. The Department did not need to ask the questions it asked to make a decision, and the request was unnecessary and frivolous. This purported change had "been submitted" on December 26, 2001.[8]

Although the United States complains of administrative problems if the deadline cannot be postponed at will by requesting more information, any problems can be minimized by reviewing the submission and requesting the information on the tenth or twentieth day rather than waiting until the fiftieth day as here.

Finally, the appellees, but not the United States, contend that the sixty day period on the plan itself could not begin until *In Re Mauldin* was precleared. (Br. 46-47). That erroneously suggests that multiple matters cannot be submitted simultaneously. Even if the appellees are correct, the sixty day period on the plan began running on February 26 when *In Re Mauldin* was precleared, and the plan is now also precleared.

CONCLUSION

The District Court decision should be reversed.

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[8] Similarly, any change from any at-large elections prescribed by § 1039 to a plan using districts could be easily evaluated for retrogression based on the information initially submitted, particularly given that Mississippi is, like so many other states, majority white.

Respectfully Submitted,

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No. 01-1437

In the Supreme Court of the United States

BEATRICE BRANCH, ET AL., APPELLANTS

v.

JOHN ROBERT SMITH, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the Attorney General is required under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to review a voting change subject to a federal court injunction that the jurisdiction involved has not appealed.

2. Whether the districting plan imposed by the state court in this case was precleared under Section 5 of the Voting Rights Act when the Attorney General requested additional information from the State rather than issuing an objection within 60 days of the initial submission.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

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INTEREST OF THE UNITED STATES

The appeal in this case involves a challenge to the Attorney General's implementation of regulations governing Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. The United States has a substantial interest in a workable and efficient preclearance mechanism under Section 5 that is not subject to unauthorized judicial review.

STATEMENT

1. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides that whenever a covered jurisdiction, such as Mississippi, see 30 Fed. Reg. 9897 (1965), "shall enact or seek to administer" a change in "any voting qualification or prerequisite to voting, or standard, practice or procedure," the State must obtain preclearance from the District Court for the District of Columbia or the Attorney General before the change may be enforced. 42 U.S.C. 1973c. Section 5 specifies that, where the preclearance submission is made to the Attorney General, the voting change may be enforced if "the Attorney General has not interposed an objection within sixty days after such submission, or * * * the Attorney General has affirmatively indicated that such objection will not be made." *Ibid.*

Under the regulations interpreting Section 5 and governing the administrative preclearance process, the covered jurisdiction has the burden of producing sufficient information to enable the Attorney General to determine that the change does not have a retrogressive purpose and will not have a retrogressive effect. See 28 C.F.R. 51.52. The regulations describe the required contents of a Section 5 submission, see 28 C.F.R. 51.26-51.28, and further provide that:

> [i]f a submission does not satisfy the requirements of § 51.27, the Attorney General may request from the submitting authority any omitted information considered necessary for the evaluation of the submission. * * * The Attorney General shall notify the submitting authority that a new 60-day period in which the Attorney General may interpose an objection shall commence upon the receipt of a response from the submitting authority that provides the information requested or states that the information is unavailable. The Attorney General can request further information within the new 60-day period, but such a further request shall not suspend the running of the 60-day period.

28 C.F.R. 51.37(a) and (c). If a jurisdiction fails to provide a complete submission, or fails to sustain its burden of proof based on the information it has submitted, the Attorney General may issue an objection. 28 C.F.R. 51.40, 51.52. A covered jurisdiction that has received an objection from the Attorney General may still implement the change if it obtains judicial preclearance from the District Court for the District of Columbia. See 42 U.S.C. 1973c; 28 C.F.R. 51.44(c).

2. a. After the 2000 census, Mississippi lost one congressional seat. The State Legislature, however, failed to pass a redistricting plan. In October, 2001, appellant Beatrice Branch and others (the Branch plaintiffs) filed suit in state chancery court and asked the court to issue a districting plan

for the upcoming 2002 congressional elections. In November, 2001, appellee John Smith and others (the Smith plaintiffs) filed a similar action before a federal three-judge district court. The Smith plaintiffs argued that any plan developed by the state court would require Section 5 preclearance, which could not be completed in time for the March 1, 2002, deadline for candidate qualification. They therefore asked the federal court to draw up its own districting plan or order at-large elections pursuant to 2 U.S.C. 2a(c)(5).

The State moved to dismiss the federal case as premature. In an order filed on December 5, 2001, the federal district court denied that motion, J.S. App. 108a, but the court nonetheless stayed its hand to permit the state court to develop an enforceable plan. *Id.* at 107a-109a. In the same order, the federal district court granted the motion of the Branch plaintiffs to intervene in the federal case. *Id.* at 108a.

On December 13, 2001, the State Supreme Court denied a petition for mandamus filed by a group of intervenors in the state-court action. In a two-page ruling, the court stated that the chancery court had jurisdiction to issue a redistricting plan. J.S. App. 110a-112a. The Smith plaintiffs then amended their complaint in federal court, claiming that the State Supreme Court's decision on the chancery court's jurisdiction also required Section 5 preclearance and that any plan issued by the state court would violate Article I, Section 4 of the United States Constitution.

On December 21, 2001, the state court adopted the Branch plaintiffs' proposed districting plan. J.S. App. 117a-160a. On December 26, 2001, the State Attorney General submitted three matters to the Department of Justice for preclearance: (1) the State Supreme Court's mandamus decision to the extent it changed the process for drawing congressional districts by authorizing the Chancery Court to create a districting plan; (2) the resulting state-court plan; and (3) a change in the legislative process for developing districting legislation, which has subsequently been precleared by the

Department of Justice and is not at issue in this litigation. *Id.* at 227a-229a. Under Section 5 and its implementing regulations, preclearance is granted by operation of law if the Attorney General makes no objection within 60 days of receiving a complete submission. See 42 U.S.C. 1973c; 28 C.F.R. 51.42. Sixty days from the State's initial submission was February 25, 2002.

On January 15, 2002, the federal three-judge court expressed "serious doubts whether the Mississippi Supreme Court's Order and the plan adopted by the Chancery Court pursuant to that order will be precleared prior to the March 1 candidate qualification deadline." J.S. App. 98a. With respect to the State Supreme Court's decision authorizing the Chancery Court to impose a redistricting plan, the court believed that "it is not at all clear that this change is not retrogressive with respect to minority voting rights" and, "[c]onsequently, it appears to us that, at the very least, the Attorney General of the United States will consider those implications very carefully, and might perhaps request more information from State authorities to clarify what is embodied in the change and the consequences thereof." *Id.* at 100a. The court thus began work on its own redistricting plan.

On February 14, 2002, the Department of Justice sent a letter to the State Attorney General regarding the Section 5 submission. The letter began by noting that two of the matters for which preclearance was requested—the State Supreme Court's decision and the resulting state-court plan —were "directly related" so that "it would be inappropriate for the Attorney General to make a determination concerning the congressional redistricting plan adopted by the Chancery Court" until preclearance could also be given to the process by which that plan was developed. J.S. App. 192a; see 28 C.F.R. 51.22(b), 51.35. With respect to the State Supreme Court's decision, the letter informed the State that

> [o]ur analysis indicates that the information sent to date regarding this change in voting procedure is insufficient to enable us to determine that all or parts of the change do not have the purpose, and will not have the effect, of denying or abridging the right to vote on account of race, color, or membership in a language minority group, as required under Section 5.

J.S. App. 193a. The Department requested additional information, *id.* at 193a-195a, and notified the State that the "sixty-day review period will begin when we receive the information specified above," *id.* at 196a. See 28 C.F.R. 51.37.

The State Attorney General provided additional information on February 19 and 20, 2002. Assuming the response was complete, that made any Section 5 objection due by April 22, 60 days later. J.S. App. 200a-214a. The State Attorney General's submission noted that "[t]he case is still in litigation by an appeal to the Mississippi Supreme Court, which will at some juncture issue * * * [a] judgment * * *, presumably including a final determination on the merits of the Chancery Court jurisdiction." *Id.* at 204a.

b. The Branch intervenors argued in federal court that the Department's request for additional information did not extend the 60-day preclearance period. See J.S. App. 33a-34a n.3. The federal district court rejected that argument, *ibid.*, and declared that it would order the State to use the federal-court plan unless the Department precleared the state-court plan by February 25, 2002. See *id.* at 60a-61a. The Department did not preclear the plan by that date.

On February 26, 2002, the federal court enjoined the State from using the state-court plan and ordered the State instead to use the plan the federal court had developed. J.S. App. 1a-3a. At the same time, the court ruled that Article I, Section 4 of the United States Constitution prohibited the state chancery court from issuing a districting plan for congressional elections. *Id.* at 4a-24a. The court-stated that its

constitutional holding "is this court's alternative holding, in the event that on appeal it is determined that we erred in our February 19 ruling" that the plan had not been precleared. *Id.* at 5a. The court therefore framed its injunction to run "until the State of Mississippi produces a constitutional congressional redistricting plan that is precleared in accordance with the procedures in Section 5 of the Voting Rights Act of 1965." *Id.* at 2a.

The Branch plaintiffs filed a notice of appeal on February 26, 2002. J.S. App. 239a. The State did not file a notice of appeal.

c. On April 1, 2002, the Department of Justice in a letter informed the State that "it would be inappropriate for the Attorney General to make a determination concerning [the State's] submission now." J.A. 29. The letter explained that "[w]here voting changes submitted by the State have been enjoined by a federal court, they are not presently capable of administration, and are not ripe for review by the Attorney General." *Ibid.*

On April 23, 2002, the Branch plaintiffs filed a motion with the federal district court, J.A. 30, requesting vacation of the Section 5 ruling and a declaration that the state-court plan is precleared. J.A. 31. They argued that the Attorney General had no authority to decline to consider the enjoined voting change and that, as a result, the submission was precleared when no objection was interposed by April 22, 2002. J.A. 31-36. The district court summarily denied that motion on June 3, 2002. J.A. 37. No notice of appeal from that order was filed.

SUMMARY OF ARGUMENT

The district court properly enjoined implementation of the state-court plan because it required, but had not received, Section 5 preclearance. Contrary to appellants' assertion, the district court's ruling on that point has not been mooted by subsequent preclearance of the state court plan, because

no such preclearance has taken place. A prerequisite to preclearance under Section 5 is that a jurisdiction "enact or seek to administer" a voting change. The state-court plan was not "enact[ed]" by the State legislature, but imposed by the state court. Moreover, after the federal court enjoined the State from using the plan, the State's failure to appeal the injunction precludes a finding that the State was "seek[ing] to administer" the plan. Accordingly, the state-court plan was not precleared by passage of time while the injunction remained in force. Indeed, although this Court need not reach the issue, the injunction itself—even if the State had appealed it—precluded the State from "seek[ing] to administer" the plan and therefore precluded its preclearance by operation of law in any event.

Appellants likewise err in contending that the State's submission was precleared under Section 5 by operation of law 60 days after the State made its *initial* submission. Before the expiration of that period, the Attorney General determined that the State's initial submission failed to carry the State's burden under Section 5 and that additional information was necessary. Under regulations whose validity was upheld by this Court in *Georgia* v. *United States*, 411 U.S. 526 (1973), such a determination extends the time within which a preclearance decision may be made. As cases subsequent to *Georgia* have made clear, the Attorney General's determination that a State has failed to carry its burden under Section 5—and therefore the relevant determination in this case—is not subject to judicial review. The State's remedy, if it believes the Attorney General's determination to be erroneous, is to file a declaratory judgment action in the District Court for the District of Columbia—the only court authorized by Section 5 to make the substantive determination whether a plan satisfies Section 5's standards. If appellants' argument were accepted, local district courts would obtain precisely the jurisdiction over the merits of Section 5 determinations that Congress denied them.

Moreover, the intrusive judicial review that appellants seek would undermine the preclearance process. Such review would subject the Attorney General to the risk that a court would later invalidate a request for more information and thereby declare a plan precleared by the mere passage of time without any substantive Section 5 determination at all by the Attorney General or the District Court for the District of Columbia. To avoid that result, and to protect the Section 5 process, the Attorney General would be forced simply to file objections rather than seek more information in doubtful cases—a result that would inevitably make the preclearance process more cumbersome for covered jurisdictions.

In this case, the Attorney General had a reasonable basis for seeking more information that would more than suffice to satisfy any applicable standard of judicial review. The Attorney General reasonably declined to pass on the Section 5 validity of the state-court plan until he could also determine the Section 5 validity of the process—the vesting of jurisdiction to draw districts in the State Chancery Court—that produced the plan. And, especially in light of the district court's finding that the process did require preclearance under Section 5, the Attorney General reasonably sought more information on that matter as well. The Attorney General's reasonable approach was nowhere near the type of abuse of the Section 5 process that could warrant holding a potentially discriminatory plan precleared without any findings on its actual discriminatory purpose or effect.

ARGUMENT

The jurisdiction of a local federal court faced with a Section 5 coverage issue is limited to determining "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate." *City of Lockhart* v. *United States*, 460 U.S. 125, 129 n.3 (1983). Appellants do not dispute that, at the very least, the state-court plan here was "covered by § 5" and therefore required preclearance before it could be enforced. Appellants also do not dispute that that the Attorney General has not expressly precleared it. They do contend, however, that "§ 5's approval requirements were satisfied" by the mere passage of time because at least one of two 60-day periods for the Attorney General to act—either the initial period beginning on December 26 and ending on February 25, or a revised period triggered by the State's submission of new material on February 20 and ending on April 22—passed without any action by the Attorney General. That contention is mistaken.

I. THE STATE-COURT PLAN HAS NOT BEEN PRECLEARED BY THE PASSAGE OF TIME DURING THE PENDENCY OF THIS APPEAL

Appellants argue (Br. 29-32) that the state-court plan was precleared by operation of law under Section 5 no later than April 22, 2002, 60 days after the State, on February 20, 2002, supplied the additional information sought by the Department of Justice.[1] On the facts of this case, that contention is wrong, because the State's failure to appeal the federal district court's injunction made clear that the State was no longer "seek[ing] to administer" the state-court plan, thus

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[1] Appellants filed a motion with the district court asking it to declare that the submission was precleared on April 22 (see J.A. 30), but they did not appeal the denial of that motion. If the State's submission, however, has been precleared during this appeal, appellants' challenge to the district court's ruling that the plan was not precleared earlier (though not their challenge to that court's constitutional ruling) has become moot. See, *e.g.*, *United States Dep't of the Treasury* v. *Galioto*, 477 U.S. 556, 559-560 (1986) (holding equal protection challenge to statute moot when later statute eliminated the discrimination). Mootness issues may be raised at any time. *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920). Accordingly, the question whether the state-court plan was precleared on April 22 appears to be properly before this Court, despite appellants' failure to appeal the district court's denial of their motion.

eliminating a critical prerequisite to preclearance by operation of law under Section 5. Moreover, as the Department's April 1 letter informed the State, even if the State had appealed the injunction, that would mean only that the State was seeking to appeal a decision that was an obstacle to the State's "seek[ing] to administer" the plan, not that the State was "seek[ing] to administer" the plan itself. Accordingly, the plan was not precleared on April 22.

A. The State Ceased "Seek[ing] To Administer" The State-Court Plan When It Failed To File A Notice Of Appeal

1. Section 5 provides that "[w]henever a [covered jurisdiction] shall *enact or seek to administer*" a voting change, "such [change] may be enforced * * * if [it] has been submitted * * * to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission." 42 U.S.C. 1973c (emphasis added). If a covered jurisdiction does not "enact or seek to administer" a voting change, then a submission by the State and a consequent failure to act by the Attorney General has no legal effect.

2. The state-court plan at issue here was not "enacted" by the State of Mississippi. See *Black's Law Dictionary* 546 (7th ed. 1999) (defining "enact" as "[t]o make into law by authoritative act; to pass"); *id.* at 910 (defining "legislate" as "[t]o make or enact laws"). To the contrary, the tangled litigation in the state and federal courts resulted from the legislature's failure to enact a plan. Accordingly, the Attorney General was required to act on the preclearance of the plan within the statutory 60-day period only if the State was "seek[ing] to administer" it.

When the Attorney General of Mississippi, acting on behalf of the State of Mississippi, made his initial submission to the Department of Justice on December 26, 2001 (J.S. App. 221a-238a), when he provided the supplemental information regarding that plan on February 20, 2002 (see J.A. 28), and until the federal district court's injunction on February 26, 2002, the State was clearly "seek[ing] to administer" the changes for which preclearance was sought. Accordingly, if before the federal-court injunction a relevant 60-day period had elapsed without action by the Attorney General, the submitted voting changes would have been precleared by operation of law.

On February 26, 2002, however, the federal district court "enjoined [the State] from implementing the congressional redistricting plan adopted by the [state court]." J.S. App. 2a. The State never appealed the district court's injunction. Accordingly, the State was no longer "seek[ing] to administer" the state-court plan and the 60-day time period was no longer running. Under those circumstances, the passing of 60 days from the date of the State's February 20 submission had no legal significance.[2]

3. Appellants argue (Br. 30) that, because Mississippi's "courts have ordered implementation of the state court plan," the State "clearly has 'enact[ed] or seek[s] to administer' that plan." As noted above, the State never "enact[ed]" the state-court plan, because its legislature never approved it. Moreover, the "seeks to administer" language appears designed to identify relevant action by a state executive, not by the state judiciary. And even if the state-court injunction supported the claim that the State at one time "s[ought] to administer" the state-court plan, the State was not seeking to do so at any time after February 26, 2002, the date the federal court enjoined the State from implementing the state-court plan and thereby removed any legal requirement

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[2] The Section 5 prerequisite is not limited to whether the State was "seek[ing] to administer" the plan at the time it was submitted; the State must be doing so as well throughout the 60-day period. Otherwise, a State could repeal a law or withdraw a submitted plan and nonetheless force the Attorney General to act on it to preclude an argument that the submission was precleared by the passage of time.

that the State put it into effect. Because the State thus was not "seek[ing] to administer" the plan on April 22, it could not have been precleared by operation of law on that date.

That conclusion is particularly appropriate on the facts of this case. The State's posture vis-a-vis the state-court plan in the federal-court litigation was ambivalent at best. Although the State moved to dismiss the federal court case as premature, it did so in light of the possibility that the state legislature would act. The State never took the position that the state-court plan had been precleared or was constitutional under Article I, Section 4. In light of that ambivalent posture toward the state-court plan, it would be particularly anomalous to find that the State was nonetheless "seek[ing] to administer" that plan notwithstanding its failure to file a notice of appeal.

Appellants' argument, if accepted, would not only contravene the express terms of Section 5, but it would force the Attorney General to review wholly hypothetical voting changes that have been enjoined by a court judgment—state or federal—and that remain unappealed by *any* party. To be sure, the private intervenors here appealed the district court's injunction one day after it was issued. But the jurisdictional time period for filing an appeal would have allowed the private intervenors to file an appeal after the 60-day preclearance clock had expired and then claim that preclearance had occurred through the passage of time. See 28 U.S.C. 2101. The only way to preclude that scenario would be to have the Attorney General evaluate enjoined plans, even when no party may ever seek an appeal.

More broadly, in light of Section 5's requirement that the State "seek to administer" the plan, the private parties' filing of a notice of appeal should have no effect on the Attorney General's obligations to act on a preclearance submission. The terms of Section 5 make clear that the Attorney General's obligations are triggered only if and when a *State* "enact[s] or seek[s] to administer" a voting change. The

actions of a private party are not the actions of a State, and the actions of a private party therefore cannot themselves satisfy the prerequisite to Section 5 preclearance.

B. The Attorney General Need Not Act On A Submission That Has Been Enjoined On Grounds Other Than A Failure To Obtain Preclearance Under Section 5

For the reasons given above, the Attorney General's failure to interpose an objection to the state-court plan by April 22 was of no legal significance. The Court therefore need not reach any other issue regarding the effect of an injunction on the Attorney General's obligations to evaluate a Section 5 submission. Nonetheless, as the Department's April 1 letter explained, the federal-court's injunction made it impossible for the State to "seek to administer" the voting changes at issue, and it therefore precluded preclearance of the plan on April 22 by operation of law under Section 5. See J.A. 28-29.

1. A voting change that has not yet been precleared under Section 5 is rarely enjoined for reasons apart from Section 5. This Court has repeatedly instructed that a "new reapportionment plan enacted by a State * * * will not be considered 'effective as law' until it has been submitted and has received clearance under § 5. Neither, in those circumstances, until clearance has been obtained, should a court address the constitutionality of the new measure." *Wise* v. *Lipscomb*, 437 U.S. 535, 542 (1978) (citations omitted).[3] Accord *United States* v. *Board of Supervisors*, 429 U.S. 642, 646-647 (1977); *Connor* v. *Finch*, 431 U.S. 407, 412 (1977); *Connor* v. *Waller*, 421 U.S. 656 (1975). Under those instruc-

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[3] Appellants are correct (Br. 31) that "this Court recognized that federal courts might enjoin voting changes on constitutional grounds independent of any Section 5 review." But such adjudication must wait until the preclearance process is finished. See *Morris* v. *Gressette*, 432 U.S. 491, 504 (1977) (noting there is "no bar to *subsequent* constitutional challenges" to precleared submissions) (emphasis added); 42 U.S.C. 1973c (Section 5 process shall not "bar a *subsequent* action to enjoin enforcement" of a voting change) (emphasis added).

tions, the district court may have erred in ruling, after it had determined that the voting changes at issue required preclearance and had not received it, that those changes also violated Article I, Section 4 of the Constitution. That error presumably will not recur frequently, and the issue of the effect of a non-Section 5 injunction on the Attorney General's obligations to act on submission of a voting change should therefore arise only in cases in which the voting change is enjoined by state courts on state-law grounds, or perhaps where exigencies require a court to reach all issues in a case at one time.

2. When the question does arise, however, the Attorney General appropriately may refuse to act on submission of a voting change that has been enjoined on non-Section 5 grounds.[4] The governing regulations interpret the statutory "enact or seek to administer" requirement as excluding a "premature submission," 28 C.F.R. 51.35, such as a legislative enactment or administrative decision that is not yet final, 28 C.F.R. 51.22(a). Until the covered jurisdiction's process has passed that threshold and the voting change is capable of implementation, a jurisdiction cannot "seek to administer" the change.

More broadly, the statutory scheme envisions that preclearance will generally occur only when there is no other present and known obstacle to a plan's taking effect.[5] Sec-

[4] Obviously, if the voting change has been enjoined on Section 5 grounds because it should have been, but was not, precleared, then the injunction has no effect on the Attorney General's responsibilities. In such a case, the goal of the injunction is precisely "to ensure that the covered jurisdiction submits its election plan to the appropriate federal authorities for preclearance as expeditiously as possible." *Lopez* v. *Monterey County*, 519 U.S. 9, 24 (1996).

[5] Under 28 C.F.R. 51.22, where approval of a submitted change by referendum or state or federal court or federal agency is necessary, the Attorney General deems the submission sufficiently ripe "if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken." That usually occurs when a

tion 5 provides that a plan "may be enforced" once preclearance occurs either by affirmative approval or by expiration of the 60-day period. It makes little sense to interpret the statute to provide that a plan "may be enforced" by expiration of a 60-day period when, in fact, it is a certainty that it will *not* be enforced because of a pending injunction on grounds unrelated to Section 5.

In addition, the rule that enjoined voting changes do not require action by the Attorney General provides the kind of bright-line, easily administrable rule that is necessary for the Section 5 process to function. The contrary rule would either require the Attorney General to act on enjoined changes that have not yet been appealed (and that may never be appealed) or to hinge action on speculation about whether appeal will follow in each case. Requiring the Attorney General to act on enjoined voting changes would also complicate the benchmark analysis; if an enjoined change is precleared while a court-ordered change takes effect, it can be unclear whether the precleared change or the court-ordered change would be the benchmark for retrogression analysis of any *future* change—especially if the injunction has been lifted by the time the future change is submitted. Finally, appeal of an enjoined change may frequently (though not in this case) result in modifications to the injunction or the enjoined change itself. See note 5,

jurisdiction is seeking Section 5 preclearance to conduct a referendum on a proposed change in its method of election or form of governance. An appeal of an injunction, however, does not seek *approval* of the underlying voting change, but *disapproval* of the court's action imposing the injunction. Moreover, depending on the legal issues involved, appeal of an injunction frequently results not merely in an up-or-down decision on the injunction, but in a decision modifying the terms of the injunction or the voting change itself. See, e.g., *Upham* v. *Seamon*, 456 U.S. 37 (1982); *White* v. *Weiser*, 412 U.S. 783 (1973); *Hickel* v. *Southeast Conference*, 846 P.2d 38, 44 (Alaska 1993); *United States* v. *Dallas County Comm'n*, 850 F.2d 1430, 1432, on reh'g, 858 F.2d 746 (11th Cir. 1988), cert. denied, 490 U.S. 1030 (1989).

supra. The best solution is to await the completion of judicial action on an enjoined plan, so that the Attorney General may examine the plan the State ultimately will enforce, rather than some other more-or-less hypothetical possibility.

II. THE DISTRICT COURT PROPERLY HELD THE STATE-COURT PLAN WAS NOT PRECLEARED 60 DAYS AFTER ITS INITIAL SUBMISSION

Appellants also argue (Br. 32-44) that the state-court plan was precleared on February 26, 2002—60 days after the State's *initial* submission to the Department of Justice under Section 5. Because the Department, however, asked for additional information before it could determine whether to preclear the plan as initially submitted, the 60-day period for preclearance did not begin to run until the State supplied that information, on February 20, 2002. Accordingly, the plan was not precleared by operation of law on February 26, 2002.

A. Incomplete State Submissions Do Not Trigger The Section 5 Administrative Preclearance Scheme

Under Section 5, a jurisdiction seeking administrative preclearance must prove that the change is nondiscriminatory, *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 328 (2000), and must provide the Attorney General with information sufficient to sustain that burden of proof, *Georgia* v. *United States*, 411 U.S. 526, 538-539 (1973). A jurisdiction's failure to provide sufficient information to sustain that burden may require the Attorney General to interpose an objection to the voting change at issue. See *ibid.*; 28 C.F.R. 51.52(c).

In some cases, despite its initial failure to provide sufficient information to sustain its burden, a jurisdiction may be able to supply additional information that will enable the Attorney General to preclear the change. To that end, the Section 5 regulations authorize the Department to request additional information from a jurisdiction that has initially "omitted information considered necessary for the evaluation of the submission." 28 C.F.R. 51.37(a). If the jurisdiction declines to provide the additional information, the Attorney General may interpose an objection based on the jurisdiction's failure to sustain its burden of proof. See 28 C.F.R. 51.40. But if the jurisdiction supplies the additional information, the Attorney General will consider that information and make a Section 5 determination within 60 days of receiving the complete response.[6] 28 C.F.R. 51.37(c). The regulations allow for only a single extension of the 60-day period. See 28 C.F.R. 51.37(c).[7]

This Court has upheld the validity of the regulations permitting a request for additional information, concluding in *Georgia* v. *United States*, 411 U.S. 526 (1973), that the regulations are within the Attorney General's authority and "wholly reasonable and consistent with the Act." *Id.* at 541. Accord *Morris* v. *Gressette*, 432 U.S. at 504 n.19. The Court reasoned that "if the Attorney General were denied the power to suspend the 60-day period until a complete submission were tendered, his only plausible response to an inadequate or incomplete submission would be simply to object to it," a "result [that] would only add acrimony to the administration of § 5." 411 U.S. at 540-541. In response to Georgia's suggestion that the regulation "open[s] the way to frivolous and repeated delays by the Justice Department," *id.* at 541 n.3, the Court noted that no such allegations were present in that case, but that "a submission to the Attorney General is not the exclusive mode of preclearance under § 5.

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[6] The response must be complete or state that the requested information is unavailable in order to commence the running of the new 60-day period. See 28 C.F.R. 51.37(d). If the jurisdiction fails to provide the requested information within 60 days of the request, the Attorney General may interpose an objection. 28 C.F.R. 51.40.

[7] The regulation permitting only a single extension was enacted after *Garcia* v. *Uvalde County*, 455 F. Supp. 101 (W.D. Tex. 1978), aff'd, 439 U.S. 1059 (1979), held that the prior version of the regulations permitted only a single extension of the 60-day period. See 52 Fed. Reg. 486 (1987).

If a State finds the Attorney General's delays unreasonable * * * the State 'may still enforce the legislation upon securing a declaratory judgment in the District Court for the District of Columbia.'" *Ibid.*

B. The Attorney General's Determination That A Submission Is Incomplete And More Information Is Needed Is Not Subject To Judicial Review

The Court in *Georgia* noted that it was not presented with a claim that the Attorney General had engaged in "frivolous and repeated delays" in the case before it when requesting more information, and the Court therefore simply stated that "we most assuredly do not prejudge any case in which such unwarranted administrative conduct may be shown." 411 U.S. at 541 n.13. The Court is now presented with a case in which appellants characterize (Br. 40) the Attorney General's request for more information as "frivolous" and "unwarranted," and argue that the Attorney General's request should be held on that basis not to have extended the 60-day period. Appellants' contention is mistaken, because later cases have made clear that the Attorney General's determinations on the merits of a Section 5 submission, let alone interim determinations that more information is needed, are not subject to judicial review.

1. Since *Georgia* v. *United States*, it has become firmly established that the Attorney General's determination on the merits of a Section 5 submission is not subject to judicial review. As this Court explained in *Morris* v. *Gressette*, the "nature of the § 5 remedy * * * strongly suggests that Congress did not intend the Attorney General's actions under that provision to be subject to judicial review." 432 U.S. at 501 (citations omitted). Because the administrative process was intended to provide "an expeditious alternative to declaratory judgment actions," and because "judicial review of the Attorney General's actions would unavoidably extend this period, it is necessarily precluded." *Id.* at 504-505.

That does not mean that a covered jurisdiction has no recourse against an unfavorable preclearance decision by the Attorney General. Congress specifically provided that even if the Attorney General objected to a proposed change, the jurisdiction could still seek judicial preclearance in a de novo action for a declaratory judgment in the District Court for the District of Columbia. See *Morris* v. *Gressette*, 432 U.S. at 504-505 & n.20.[8] The availability of that alternative de novo judicial action—a statutory second bite at the apple—obviates the need for judicial review of the Attorney General's Section 5 determination.

Under *Morris*, a court may not review the Attorney General's determination that a jurisdiction has failed to carry its burden of proving that the submitted change satisfies Section 5. It follows *a fortiori* that a court also may not review the Attorney General's legally indistinguishable determination that a jurisdiction has failed to carry its burden under Section 5 but that the jurisdiction should have more time to complete its submission and perhaps obtain preclearance.[9] Indeed, judicial review of a request for additional information would necessarily require the court to do what *Morris*

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[8] The Court also noted that third parties could still challenge a precleared change under the Constitution or Section 2 of the Voting Rights Act, 42 U.S.C. 1973. *Morris*, 432 U.S. at 504-505 & n.20.

[9] Because the request for information ordinarily will—and in this case did—state that the jurisdiction had failed to carry its burden of proof in its initial submission, a mistaken request for more information would in any event be a conditional objection, not an unintentional preclearance. Neither the statute nor the regulation prescribe the words by which the Attorney General must interpose an objection. "[T]he purpose of [Section] 5 is to establish procedures in which voting changes can be scrutinized by a federal instrumentality before they become effective." *United States* v. *Board of Comm'rs*, 435 U.S. 110, 136 (1978). Although "inaction by the Attorney General may, under certain circumstances, constitute federal preclearance of a change, the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *Ibid.*

forbids: to determine whether the jurisdiction's initial submission provided information sufficient to carry its burden of proof that the submitted change did not have a discriminatory purpose or effect. Although the Attorney General may err in determining that a submission is incomplete, the jurisdiction's remedy is the one identified in *Morris*: to invoke the "basic mechanism for preclearance" under the statute—"a declaratory judgment proceeding in the District Court for the District of Columbia." *United States* v. *Board of Comm'rs*, 435 U.S. 110, 136 (1978).

2. The facts of this case illustrate the point. The Department of Justice informed the State that it was requesting further information because "the information sent to date regarding this change in voting procedure is insufficient to enable us to determine that all or parts of the change do not have the purpose, and will not have the effect, of denying or abridging the right to vote." J.S. App. 193a. There is little difference between that determination and the unreviewable decision whether to issue an objection. In either case, the jurisdiction could have sought judicial preclearance as an alternative to providing the Attorney General with additional information. But in neither case does Section 5 permit, as an alternative remedy, judicial review of the Attorney General's decision.

Indeed, appellants seek to upset Section 5's carefully developed scheme by allowing review at the insistence of third-party intervenors. Congress explicitly placed control over initiation of the preclearance process in the hands of the covered jurisdiction, to the exclusion of third parties. Only a covered jurisdiction may seek administrative preclearance of a voting change. See 42 U.S.C. 1973c (administrative preclearance may be sought only by "the chief legal officer or other appropriate official of such State or subdivision"). Only a covered jurisdiction may seek judicial relief from an administrative Section 5 objection through a declaratory judgment action before the District Court for the District of

Columbia. See *ibid.* ("[S]uch State or subdivision may institute an action" seeking judicial preclearance.). The statute thus precludes a private party from initiating preclearance of a voting change. It would be particularly anomalous to permit a private party to obtain such preclearance through the mechanism of a review of the Attorney General's determination that the covered jurisdiction has failed to submit sufficient information to warrant preclearance.

3. Permitting judicial review, as appellants urge, would have serious consequences for the enforcement of Section 5.

a. First, judicial review would inevitably extend and add acrimony to the administrative process. That is most clearly seen in a case in which the Attorney General requests additional information and then issues an objection. Under appellants' theory, any party that stood to benefit under the original submission could argue that despite the Attorney General's objection to the change, it was precleared by operation of law 60 days after the initial submission because the request for additional information was erroneous. Such lawsuits would completely frustrate the limits on judicial review of Attorney General determinations. Such lawsuits also could place a cloud over the finality of the Attorney General's determination and the legal status of the original plan. They could also pose the risk of competing federal lawsuits over the same plan, with the jurisdiction seeking judicial preclearance from the District Court of the District of Columbia—while private parties litigated a collateral attack on the Attorney General's request for additional information in a local court.[10]

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[10] Such a situation could arise, as in this case, where a party seeks a Section 5 injunction in light of the Attorney General's objection and a party to that case argues that the injunction is moot, because the plan was actually precleared because the objection was preceded by an improper request for information. A plaintiff might also file a state law mandamus action to require State officials to enforce the voting change, arguing that officials had a duty to administer the change under state law and that

b. Second, appellants' theory permits any local three-judge court to consider whether the initial request was sufficient to warrant preclearance, despite the "congressional choice in favor of specialized review" of substantive Section 5 issues by the District Court for the District of Columbia, a choice that "necessarily constrains the role of the [local] three-judge district court." *Lopez* v. *Monterey County*, 519 U.S. 9, 23 (1996); see *Perkins* v. *Matthews*, 400 U.S. 379, 385 (1971).

c. Third, to avoid the risk of preclearing discriminatory plans through a faulty request for further information, the Attorney General would be forced to stop making such requests and simply enter an objection whenever a jurisdiction has failed to provide sufficient information to sustain its burden of proof. See *Georgia*, 411 U.S. at 540. In other words, the Attorney General would be forced to abandon a practice this Court found to have substantial practical value for covered jurisdictions. *Id.* at 540-541. That would lead to many unnecessary objections to plans that could otherwise have ultimately obtained preclearance. In short, back-door judicial review of the Attorney General's decision on the merits of a Section 5 submission is impermissible under this Court's post-*Georgia* precedents and could needlessly tangle the Section 5 process in litigation that would make the entire scheme less workable and more onerous for covered jurisdictions.

C. The Attorney General Properly Delayed Preclearance Of The State-Court Plan While Awaiting Further Information Regarding The Change In The Redistricting Process

Even if it is assumed that a local district court could engage in judicial review of a request by the Attorney General for more information necessary to determine the Section 5

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federal law did not prohibit administration of the change because the change had been precleared.

status of a voting change at the behest of an intervenor, such review must be highly deferential, limited to the question whether the request is "frivolous" or "irrelevant to § 5 evaluation." *Georgia* v. *United States*, 411 U.S. at 540, 541 n. 13. The request for more information in this case, however, was reasonable at the time it was made, regardless of whether the process about which the information was sought is ultimately determined to be a voting change that required preclearance under Section 5 or not. Accordingly, the Attorney General's request for more information extended the beginning of the 60-day period for action under Section 5 until that information was supplied on February 20, and the districting plan was not precleared when the 60-day period from the State's initial submission passed on February 26.

1. If judicial review of the Attorney General's request for more information—and consequent extension of the 60-day administrative preclearance period under Section 5—is permissible at all, it must be conducted very deferentially. In *Georgia*, the Court upheld the regulation permitting the Attorney General to extend the time by a request for more information, and it reserved only the question whether the preclearance time would be extended by a case that presented "frivolous and repeated delays by the Justice Department"—a possibility eliminated by the post-*Georgia* regulation permitting only one extension of time, see p. 2, *supra*—or "unwarranted administrative conduct."

The Court's implicit determination in *Georgia* that more searching judicial review would be improper was correct. The core purpose of Section 5 is to ensure that voting changes in covered jurisdictions are scrutinized, either administratively or judicially, before being permitted to take effect. *Board of Comm'rs*, 435 U.S. at 136. If the Attorney General's ability to request more information and thereby extend the preclearance period were subject to intrusive judicial review, a request for more information would become a highly risky venture. Every time the Attorney

General requested more information and then waited beyond the sixtieth day to make a final ruling, he would be taking the chance that a reviewing court would later find the request mistaken, with the result that the voting change was precleared by operation of law with no substantive determination made at all. That regime would undermine the core purpose of Section 5. Accordingly, any review of the Attorney General's determination that additional information is needed must be sharply limited to uncovering requests for more information that are entirely without foundation.

2. The Attorney General's request for more information in this case was reasonable, and it therefore was more than adequate to extend the 60-day preclearance period under any applicable standard of judicial review. See J.S. App. 33a-34a n.3 ("[T]he Department of Justice's decision to investigate the change in state law that authorized the Chancery Court to adopt a redistricting plan, before considering the plan itself, does not constitute 'unwarranted administrative conduct.'"). First, the Attorney General's determination not to pass on the preclearance of the state-court districting plan itself until he could pass on the process by which that plan was imposed was reasonable. Second, the Attorney General's determination that more information was necessary to pass on the process was also reasonable.

a. Initially, the Attorney General acted appropriately in extending the time to pass on the Section 5 validity of the state-court plan until he could also determine whether Section 5 would preclude the asserted change in process vesting the Chancery Court with jurisdiction. Regulations adopted to implement Section 5 make clear that the Attorney General may not preclear a districting plan if that plan was developed through a process that itself violated Section 5. See 28 C.F.R. 51.15, 51.22(b). This Court has reached the same conclusion. In *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636, 638-639 n.6 (1976), the Court noted that a local covered jurisdiction had not

purported to reapportion itself in accordance with state enabling legislation. The Court explained that, because the State's "enabling legislation [that would permit the local jurisdiction to reapportion itself] was opposed by the Attorney General * * * under § 5 of the Voting Rights Act, the [local jurisdiction] did not have the authority to reapportion itself." *Ibid.*

Similarly here, if the authorization for the state court to impose a districting plan lacked required preclearance, then the state court had no authority to order a plan into effect, and preclearance of the resulting plan would be inappropriate. In those circumstances, especially in light of the federal district court's determination that the process did require preclearance, see J.S. App. 97a-98a, the Attorney General reasonably determined that he could not pass on the districting plan itself without at least obtaining more information about process.

Appellants argue (Br. 34) that, if the process leading up to the plan did not constitute a voting change subject to Section 5, "the additional information requested [by the Department of Justice] does not relate to any voting changes, and the voting change that did occur—the redrawing of the lines—was precleared when the sixtieth day expired on February 25 without objection."

Appellants' argument is mistaken, because the validity of the extension of time does not turn on what a court, in hindsight, ultimately determines to be the correct view of whether the State's initial submission was in fact complete; it turns instead, at most, on whether the Attorney General had any possible foundation for seeking more information and extending the time. The Attorney General, acting pursuant to rules declared valid by this Court in *Georgia* v. *United States*, extended the preclearance period for both the vesting of jurisdiction in the state chancery court and the drawing of the district lines. If judicial review of the Attorney General's determination is permissible at all, it extends

only to reviewing whether he acted without foundation in extending the time. Even if a court ultimately determines that the vesting of jurisdiction in the chancery court was not subject to preclearance—and that further information on that subject was, in hindsight, irrelevant under Section 5—that would not retroactively invalidate the Attorney General's determination that he needed more information and the time should be extended.

b. Not only did the Attorney General act reasonably in considering the predicate process before acting on the redistricting plan, but his specific request for more information about that process was also reasonable.[11] Determining whether a submission is a covered change is part of the administrative preclearance decision. See 28 C.F.R. 51.35 (the Attorney General "will make no response on the merits with respect to an inappropriate submission," including "submission of standards, practices, or procedures that have not been changed [and] submission of changes that affect voting but are not subject to the requirement of Section 5"). The submission in this case presented the Attorney General with the novel question of whether the assumption of jurisdiction to issue a remedial redistricting order was the sort of change "with respect to voting" covered by Section 5.[12] The State

[11] Because the propriety of the Attorney General's action does not turn on whether the change in process was in fact subject to preclearance, the Court need not determine in this case whether this type of change is subject to Section 5.

[12] This was the first time that any jurisdiction submitted a court's assumption of jurisdiction for preclearance and the first time any court has suggested that such a change might be covered by Section 5. While the State of North Carolina did recently submit the State Supreme Court decision in *Stephenson* v. *Bartlett*, 562 S.E.2d 377 (N.C. 2002), for preclearance, it did so in order to obtain review of the substantive standards for redistricting set forth in that opinion and to request that the Attorney General withdraw a prior objection to certain districting practices that were modified by the new decision. See J.S. App. 1a-3a. North Carolina did not seek preclearance of the State Supreme Court's conclusion that the

specifically requested preclearance of the change (J.S. App. 227a-228a), and the federal district court stated its view (*id.* at 97a-98a) that assumption of jurisdiction "clearly appears to be a change in Mississippi's election procedures that must be precleared by federal authorities." While the district court's holding was not strictly binding on the Attorney General, see *Hathorn* v. *Lovorn*, 457 U.S. 255, 268 n.22 (1982), it was entitled to substantial deference, see 28 C.F.R. 51.56, and a disagreement with the court on that issue would have had serious practical consequences. Had the Department refused to provide a response on the merits of the State's submission of the Chancery Court's assumption of jurisdiction, the district court may well have continued to enjoin the plan until precleared by the District Court of the District of Columbia.

The Attorney General's response to this unusual situation was to take seriously the question of coverage while investigating possible means of resolving the submission on other grounds. Thus, the Attorney General properly considered whether the assumption of jurisdiction represented a change in voting practice, rather than the invocation of a power that predated the Voting Rights Act, asking the State to clarify the basis for the State Supreme Court's determination that the Chancery Court had jurisdiction to develop a new plan (Question 2(A), J.S. App. 193a), and "whether Chancery Courts historically have had jurisdiction to preside over proceedings involving state-wide redistricting plans and then themselves adopt and implement such plans" (Question 2(G), J.S. App. 195a).[13]

state courts had authority to issue redistricting orders to remedy violations of the state constitution.

[13] The district court (J.S. App. 98a) and the State Attorney General (J.S. App. 228a-229a) further indicated that the state-court process represented a change because it departed from the at-large election requirements of Miss. Code Ann. § 23-15-1039 (1999). The Attorney General also

The Attorney General also requested information concerning the discriminatory potential of such a change, because the possibility remained that he could determine that it satisfied Section 5's substantive standards without deciding whether it was subject to those standards. Cf. 28 C.F.R. 51.37(c) (permitting only a single extension of time to request further information). A change has a discriminatory effect under Section 5 if

> it will lead to a retrogression in the position of members of a racial or language minority group (*i.e.*, will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively.

28 C.F.R. 51.54(a). A change has a discriminatory purpose if its purpose is to achieve that effect. *Bossier Parish*, 528 U.S. at 341. This Court has explained that "assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a 'sensitive inquiry into such circumstantial and direct evidence as may be available.'" *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997). "[C]onsiderations relevant to the purpose inquiry include, among other things, the historical background of the jurisdiction's decision; the specific sequence of events leading up to the challenged decision; [and] departures from the normal procedural sequence." *Id.* at 489 (citations and internal punctuation omitted).

The district court suggested a number of questions that might be relevant to this determination, see J.S. App. 100a, 194a, and the Department reasonably followed many of those suggestions. For example, the Department asked a series of questions to determine whether turning the districting process over to a chancery court could be manipulated for discriminatory purposes or to achieve discriminatory results.

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requested information to evaluate that question. See Question 2(B), J.S. App. 194a.

As the district court observed, there is a risk of retrogression where "redistricting decisions will depend on the individual views of an individual judge, elected by a small percentage of the State's voters," *ibid.*, particularly if a plaintiff can effectively select that individual judge through forum shopping. The chances of discriminatory results in such a process could be substantially greater than if districting were conducted by the state legislature through the collective action of representatives elected throughout the State. The Department, therefore, asked questions about the chancery court system (Questions 2(C)-(D), J.S. App. 194a) and the ease with which a plaintiff intent on achieving retrogressive results could select a favorably-disposed judge (Questions 2(E)-(H), J.S. App. 194a-195a). The letter also sought information regarding the historical background leading to the state court's assertion of authority to redistrict. See Question 2(G), J.S. App. 195a. And the Department asked questions to determine whether districting by the state chancery court was consistent with, or a departure from, "the normal procedural sequence." See Questions 2(A)-(B), (G), J.S. App. 193a, 195a.

That the effect of the change in process on voting would be indirect, and that any discriminatory effect might later be remedied by subsequent Section 5 review of the resulting plan, are not sufficient reasons to conclude the change was nondiscriminatory. "The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations" with discriminatory effects. *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 565 (1969). The regulations require preclearance of "[a]ny change *affecting* voting, even though it appears to be minor or *indirect*." 28 C.F.R. 51.12 (emphasis added). Thus, the regulations require preclearance of changes in the "procedure for instituting a change affecting voting" or authorizing legislation, as well as the resulting substantive changes under that changed procedure. 28 C.F.R. 51.15-51.16. That is true even though the change in process has only an in-

direct effect on voting and even though the changes resulting from the new process would themselves be subject to preclearance. See, *e.g.*, *East Carroll Parish Sch. Bd.*, 424 U.S. at 638-639 n.6 (requiring preclearance of statute authorizing county to apportion itself, as well as resulting apportionment); *Board of Comm'rs*, 435 U.S. 110 (1978) (requiring preclearance both of decision to hold referendum on changing form of county government, and the resulting change).[14]

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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[14] Appellants note (Br. 42) that the questions asked of Mississippi in this case were not asked regarding a subsequent submission regarding redistricting in North Carolina. The cases are quite different, however. No party or court had suggested that the North Carolina courts' assumption of jurisdiction to order redistricting required preclearance under Section 5. Although the Attorney General attempts to identify changes requiring preclearance even when they are not brought to his attention by the covered jurisdiction, the volume of submissions reviewed annually necessarily focuses the Department's attention on those features of voting changes identified by the parties to the preclearance process. Moreover, in the North Carolina case there was no suggestion that the assumption of jurisdiction represented a *change* in the authority of the State courts. See *Stephenson*, 562 S.E.2d at 392, 393. In contrast, both the Mississippi Attorney General (see J.S. App. 228a) and the federal district court (*id.* at 97a-98a) in this case asserted that the chancery court's assumption of jurisdiction departed from traditional practices under state law.

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No. 01-1437

In The

Supreme Court of the United States

BEATRICE BRANCH; RIMS BARBER; L. C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,

Appellants,

v.

JOHN ROBERT SMITH; SHIRLEY HALL; GENE WALKER; ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE NATIONALIST MOVEMENT IN SUPPORT OF OF NEITHER APPELLANTS NOR APPELLEES

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Nationalist Movement moves pursuant to Supreme Court Rule 37.2(b) for leave to file an *amicus curiae* brief in support of neither party. Counsel for Appellants, Beatrice Branch *et al*, and for Appellee, John Robert Smith, *et al*, have withheld consent to the filing. No response has been received from requests for consent from other counsel for other parties. The Nationalist Movement is concerned about forum-shopping, which focuses upon form, rather than substance, in the Mississippi Congressional re-districting controversy, in light of Fourteenth Amendment considerations and clear-precedent that districts may not be drawn exclusively for racial gerrymandering. The Nationalist Movement is concerned lest equal-protection guarantees be abdicated by the federal courts. For this reason, The Nationalist Movement respectfully requests that its Motion for Leave to File an *Amicus Curiae* Brief be granted.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The Nationalist Movement submits this brief in support of neither the position of Beatrice Branch, *et al*, nor John Robert Smith, *et al.*[1]

The Nationalist Movement is a non-profit, pro-majority[2] membership organization, chartered by the State of Mississippi. Its principal office is at Learned, Mississippi, within the Second Congressional District, one of the districts impacted by this litigation. The Nationalist Movement has members throughout the nation, but, especially, in Mississippi's Second Congressio-

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[1] Counsel of record for The Nationalist Movement, Richard Barrett, certifies pursuant to Supreme Court Rule 37.6 that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of the brief.

[2] The term "pro-majority," as used by The Nationalist Movement, refers to propagation of the doctrine of majority-rule and democracy, as set forth generally by Thomas Jefferson in his Inaugural Address on March 1, 1801, defined as:

> absolute acquiescence in the decision of the majority, the vital principle of republics, from which there is no appeal but to force, the vital principle and immediate parent of despotism.... and should we wander from [this principle] in moments of terror or alarm, let us hasten to retrace our steps, and to regain the road, which alone leads to peace, liberty and safety.

Orations of American Orators, Vol. 1, Rev'd. Ed., Cooperative Publishing Society, New York (1900).

nal District, where many of its members and officials work, live and seek to exercise their franchise.

Through The Nationalist Movement, members are able to organize, exchange information, speak out and seek voting opportunity. Among propositions supported by The Nationalist Movement are voting by initiative and referenda, to achieve more popular democracy, run-off primaries, to assure majority-rule, and repeal of the Voting Rights Act,[3] to prevent favoritism and privilege in derogation of the Fourteenth Amendment.

The Nationalist Movement has an interest in Congressional re-districting in Mississippi in that some of its members and officials have already evacuated the Second Congressional District, perceiving that their rights and franchise are adversely impacted by racial gerrymandering. And others, including members of the general public, are following suit. The enormous toll taken by the imposition of minority racial-gerrymandering plays out in diminished voting, apathy toward the political system and decline in civic participation.

The Nationalist Movement has been and remains an advocate of federal guarantees of fundamental and constitutional rights. It not only opposes abdication of those rights, but has actively and successfully championed such rights in the courts, in the streets and through educational undertakings.

Neither a blank-check retrenchment to "states-rights," under the flawed plan of Appellants, nor a rubber-stamping of the flawed plan of Appellees, comports with the Constitution.

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[3] Voting Rights Act of 1965, 42 ***USC*** §1973.

ARGUMENT

If the District Court's decision were affirmed, it is not necessarily *Growe v. Emison* which would be overruled, precluding the courts of most states from playing any role in Congressional re-districting, even when legislatures default, but equal-protection guarantees of the Fourteenth Amendment, pursuant to *Miller v. Johnson*, which would be abrogated, by imposing prohibited racial gerrymandering.

This Congressional re-districting case presents a unique and salient opportunity to finally uproot racial gerrymandering, which has been struck down, heretofore, in various Southern states, but which, so far, has escaped judicial scrutiny in Mississippi.

The matter comes before the Court because minority Appellant Bea Branch, of the National Association for the Advancement of Colored People, and those aligned with her, had sought approval of a plan by a minority judge, in state court, which would have installed a minority Congressman in the Second Congressional District and supposedly given a Democrat, perceived as more friendly to minorities, an advantage in the Third Congressional District. Appellee John Robert Smith, a Republican, and those aligned with him, had concurred in the installation of a minority in the Second District, but sought approval of a federal court to draw the Third District in a manner perceived as more friendly to Republicans. Richard Barrett, an elector of Mississippi who had been a candidate for Congress in the Second District, opposed both plans. He alleged that he and other voters had been substantially disadvantaged in an opportunity to influence the political process effectively and sought to redraw the Second District along traditional lines, to prevent racial gerrymandering. He moved to intervene in the District

Court, but was not allowed.[4]

With both Appellants and Appellees, as well as both the state and federal courts, acquiescing to what Appellants describe as a "majority-black" Second District, attention was drawn to arguments[5] over which court should draw the plan,

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[4] The applicant for intervention first filed an Affidavit of Bias, pursuant to 28 ***USC*** §144, seeking recusal of District Judge Henry Wingate, who had been named to a three-judge federal panel to hear the case. Wingate declined to entertain or rule upon the recusal request and no other judge was assigned to hear the proceeding, despite the mandate of the statute. The three-judge panel then, on December 12, 2001, denied the Motion to Intervene, which had included; in the alternative, a request for leave to file an *amicus curiae* brief.

[5] The Voting Rights Act, as the instant case points up, has proven to be contorted, bedeviling and, even, largely unfathomable. Arguments, by both Appellants and Appellees, over "preclearance," "evaluation," "submission," "compliance," "legislation," "waiver," "violation," "review," "enablement," "voting change," "enforcement," "supremacy clause" and "duty," *see* Jurisdictional Statements, Motion to Affirm, Conditional Motion to Affirm, Brief Opposing Motion to Affirm and Brief in Opposition to Conditional Motion to Affirm, to name a few, belie the riddle-like and hydra-headed qualities and artifaces of the Act. To paraphrase Winston Churchill, the Act is "a riddle, wrapped in a mystery, inside an enigma," with racial gerrymandering, advanced by the Act's apologists, being in open warfare against attempts to create a "more perfect Union," instead of a more fragmented society. *See, e.g. Shaw v. Hunt*, 517 U.S. 899 (1996) ("Balkanization" deplored).

> If racial considerations predominate in the redis-

insofar as the Legislature had not agreed upon its own plan. While the ultimate forum-shopping was taking place, Appellants repaired to a states-rights' approach,[6] largely from pre-

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> tricting process, the ... plan will be vigorously challenged in court. The entire redistricting process will be thrown into jeopardy when the traditional redistricting principles – compactness, contiguity, and respect for political subdivision – are not strongly considered. Of course, the critique of this principle of "impermissibility" of racial consideration is that it conflicts with the standards of the Voting Rights Act....
>
> [T]here appears to be no consistent conformity. Even the federal courts have been reluctant to present an adequate mathematical formula to guide redistricting plans.

Redistricting in North Carolina, An Overview of Emerging Judicial Decisions and Doctrines, Ngozi Caleb Kamalu, Professor of Political Science, Fayetteville State University, *North Carolina Political Review,* May-June, 2002, Fayetteville, North Carolina, http://www.ncpoliticalreview.com/0502/kamalu1.htm.

Notwithstanding, the practical and constitutional infirmities of the Act laid bare by this and other proceedings may well gravitate toward the scrapping of the Act, which expires shortly, altogether, precluding tortured interpretations and disquieting contortions of the Constitution, in such context, from being ever again pressed upon the courts. After all, the Constitution should be changed, if at all, by the amendment process, not by way of statute or fiat.

[6] Citing *Growe v. Emison*, 507 U.S. 25, 33 (1993) (postulating "significant role" of state courts).

Baker v. Carr[7] days, to bolster the state-court judge, who had been installed using "sub-districts"[8] for the sole purpose of installing minority office-holders.[9]

So, if the Court were to decide that either the state or federal court were the proper forum, without more, it would have skirted the substantive issue of Fourteenth Amendment protections, altogether. Such rubber-stamping[10] would result in reversion to racial-gerrymandering strongly condemned by the

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[7] *Baker v. Carr*, 369 U.S. 186 (1962) (federal courts largely usurping state courts on re-districting).

[8] Created for the first time for judicial districts in *Martin v. Mabus*, 700 F.Supp. 327 (S.D.Miss.1988).

[9] The largely discredited procedure had been imposed to draw "sub-districts" around where minorities lived and from which minorities could qualify to seek office, although office-holders would represent larger, non-minority areas. The rationale had been that even though elections had been "opened up" to minorities, minorities still persisted in voting for non-minorities. The procedure has only been installed in a few Southern districts, *see e.g.*, "One Man, Seven Votes," *Clarion-Ledger*, Jackson, Mississippi, June 17, 1993 (minority weighted-voting in Chilton, County, Alabama) and has been criticized as the Lannie Guinier Plan, after the failed Clinton-Administration-appointee who favored drawing districts exclusively to install minorities with less than a majority vote. *See*, "Supreme Court Signals End to Racial Gerrymandering," *Montgomery Advertiser*, Montgomery, Alabama, July, 1993, http://www.majorcox.com/columns/dist-2.htm (criticism of Guinier Plan for advocating less than majority vote to hold office).

[10] *Cf. Horton v. City of Houston*, 179 F.3d 188 (5th Cir.-1999) ("rubber-stamping" condemned).

Court, heretofore. However, the Court notably seeks to consider substance over form, *cf. Swann v. Board of Education,* 402 U.S. 1, 31 (1971) ("Substance, not semantics, must govern"). To do so, it should remand[11] to whichever court seems to have the more persuasive claim to jurisdiction, but with instructions to consider the impact of *Shaw v. Reno*, 509 U.S. 630 (1993) (equal-protection applies to racial-gerrymandering claim), *Miller v. Johnson,* 515 U.S. 900 (1995) (racial gerrymandering condemned) and equal protection, so that the proposed Second district, drawn exclusively for purposes of racial gerrymandering and, in the process, tainting the Third District and the entire body politic, cannot stand.

Under either plan, the Second district has been drawn in a prohibited manner, for prohibited reasons.[12] May a Chancellor

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[11] *See, e.g., Upham v. Seamon,* 456 U.S. 37, 44 (1982) (Texas re-districting remanded for additional fact-finding) for the procedure to remand for additional facts. *See also, Shaw v. Reno,* 509 U.S. 630 (1993) (difficulty of proof does not relieve racial gerrymander from scrutiny under the Equal Protection Clause).

The *Shaw* holding bars, on Fourteenth Amendment grounds under the Equal-Protection Clause, efforts to set up separate districts solely because of race, unless narrowly-drawn to serve some compelling governmental interest, none of which is shown in the instant case.

[12]

> And the *key* here is I'm not concerned necessarily about boundaries, *per se*, but we must also remember, let's maintain some African-American representatives in this State. This State has more African-Americans than any state in the Union [emphasis added].

in one district compile Appellants' plan for an entire state? Seemingly so, as much as a divorce granted in one court would be recognized by others. But, may such a court concoct a "tornado" district, lacking in requisite compactness,[13] in derogation of traditional[14] districting considerations, for the exclusive pur

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Bo Brown, minority Jackson, Mississippi city-councilperson, before the Joint Committee of Senators and Representatives of the State of Mississippi on Redistricting, *Official Transcript*, Hinds County Courthouse, Jackson, Mississippi, May 21, 2001, 85.

> But the fact is ... this [Second Congressional] district [was drawn] to elect an African-American candidate.

Haley Barbour, former Chairman, Republican National Committee, "Fellow-Republican" Campaign statement, May 27, 2002, Yazoo City, Mississippi, http://www.charlottereeves.-com/hierarchy.html, noted in "Republican 'Elite' Unwise," *Clarion-Ledger*, Jackson, Mississippi, June 12, 2002.

[13] See *Shaw* for "reasonable compactness" requirement.

[14] Draw the lines as they were, right across the State.

Richard Barrett, former Second-Congressional-District candidate, before the Joint Committee of Senators and Representatives of the State of Mississippi on Redistricting, *Official Transcript*, Hinds County Courthouse, Jackson, Mississippi, May 21, 2001, 110.

In 1980, Congressional districts traditionally ran East and West, across the state, similar to Supreme Court districts. "Mississippi Congressional District Map for 1980," *Official and Statistical Register 1980-1984*, Mississippi Secretary of State's Office, Jackson, Mississippi, 188 (1980). In 1990, under the

pose of shoring up the Second, minority district? It may not. Neither may Appellees fall back on their plan, which also imposes a non-compact[15] district, in the Second district, with telltale "crab-legs"[16] protruding to take in minority areas.

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presumption that a minority district was "required," the lines were re-drawn, North to South, carving out the minority district in the Mississippi Delta. The plans by both Appellants and Appellees maintain such a district and, even extend it in a more "salamander-like" path along the Mississippi River. But see, *Abrams v. Johnson*, 521 U.S. 74 (1997), condemning the substitution of racial for traditional districting considerations.

[15] A district must be compact to pass constitutional muster, *e.g. Thornburg v. Gingles,* 478 U.S. 30, 47 (1986).

[16] Districts so bizarre on their face as having no explanation other than racial gerrymandering require "strict-scrutiny," *see, e.g. Miller.*

CONCLUSION

Reversal of the District Court and remand, under adequate instructions for the drawing of Mississippi Congressional districts which comport with equal protection under the Fourteenth Amendment, should likely assure that facts will be developed adequately to draw such districts and the Constitution will be adhered to.

Whether a state court, subject to challenge for unconstitutional "sub" districts, or a federal court, susceptible to a challenge for "usurpation" of the legislature, ultimately draws the districts, remand instructions to avoid racial gerrymandering should likely be sufficient to guide either body in performing its task. Controversy over any possible "forum-shopping" will, then, also, have been laid to rest.

It may be desirable for the Court to, also, direct that voters, excluded below or otherwise, be granted leave on remand to intervene, should they have proper standing and desire to do so. And that any challenge to any judge for bias be adequately and promptly heard, according to law, fair-play and traditional notions of substantial justice.

Respectfully submitted,

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BEATRICE BRANCH, *et al.*,
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On Appeal from the United States District Court for the Southern District of Mississippi

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, AND CONGRESSIONAL BLACK CAUCUS IN SUPPORT OF APPELLANTS

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INTEREST OF THE AMICI CURIAE[1]

The National Association for the Advancement of Colored People ("NAACP") is a nonpartisan, nonprofit organization with a substantial number of members nationwide. The NAACP has chartered affiliates in the State of Mississippi. Since its founding in 1909, one of the principal goals of the NAACP has been to insure that minority group citizens have an equal and fully effective opportunity to participate in the political process and to elect representatives of their choice. The NAACP has fought for passage of the Voting Rights Act of 1965 and, thereafter, has sought to ensure the voting rights of racial minority voters through legislative advocacy and litigation.

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("Lawyers' Committee (SF)") is a civil rights and legal services organization devoted to advancing the rights of people of color, low-income individuals, immigrants and refugees, and other underrepresented persons. The Lawyers' Committee (SF) is affiliated with the Lawyers' Committee for Civil Rights Under Law. The Lawyers' Committee (SF) has a keen interest in proper implementation of Section 5 of the Voting Rights Act and protecting against retrogression of minority voting interests. Indeed, the Committee successfully represented minority citizens in two of the more recent §5 cases decided by this Court. See, *Lopez v. Monterey County*, 519 U.S. 9 (1996) and *Lopez v. Monterey County*, 525 U.S. 266 (1999).

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[1] The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* certify that no counsel for any party authored this brief in whole or in part. No persons other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

The Congressional Black Caucus ("Caucus") was formed over thirty years ago with the goals of seeking to positively influence the course of events pertinent to African-Americans and others of similar experience and situation, and to achieve greater equity for persons of African descent in the design and content of domestic and international programs and services. The Caucus has not only been at the forefront of issues affecting African-Americans, but has garnered international acclaim for advancing agendas aimed at protecting human rights and civil rights for all people. Today, the Congressional Black Caucus has 38 members.

INTRODUCTION AND SUMMARY OF ARGUMENT[2]

Under Section 5, 42 U.S.C. §1973c, the Attorney General has sixty days to make a preclearance determination under Section 5 of the Voting Rights Act. The record below shows that although the Attorney General possessed all information necessary to make the limited determination that Section 5 authorizes him to make (*i.e.*, whether the redistricting plan was free of a racially discriminatory purpose or effect), he failed to do so. While the Department of Justice did ask the State to provide information about the operation of its chancery court system within the initial sixty days, the information sought not only was irrelevant to a review of the State's congressional redistricting plan, but it was also inconsistent with the approach taken by the Attorney General in other states subject to Section 5. *Amici's* position herein is that a congressional map drawn by a Mississippi state court was submitted by the State of

[2] *Amici* in this brief address only the issue of the effect of the Attorney General's delay in reviewing Mississippi's congressional redistrcitng plan. Amici support appellants' arguments that the state court in Mississippi had jurisdiction to decide the congressional redistricting case before it and to impose a congressional redistricting plan in the absence of the Mississippi Legislature enacting a plan.

Mississippi to the Attorney General for preclearance under Section 5 of the Voting Rights Act, and was precleared by operation of law when he failed to object to the map or ask for relevant information within sixty days.[3]

Congress designed the Voting Rights Act in 1965 "to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The most potent weapon in the Act was Section 5, which required covered jurisdictions to submit all voting-related changes to either a special three-judge federal court in the District of Columbia or to the United States Attorney General before such voting changes may be implemented.

Section 5 is an extraordinary measure. Voting changes are legally unenforceable "unless and until" preclearance of the changes is obtained. "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." *Id.*, at 329. Consequently, this Court upheld Congress' power to design Section 5 in a manner that would "shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Ibid.* Mississippi and its political subdivisions have been subject to the preclearance

[3] *Amici* also agree with appellants that even if the Attorney General's request for additional information about the operation of the state chancery court system in Mississippi and the propriety and authority of those courts to rule in congressional cases tolled the sixty day clock under Section 5, the plan was later precleared when the Attorney General failed to interpose an objection to the plan by April 22, 2002, the sixtieth day after the State responded with additional information.

requirements of Section 5 since the effective date of the Act, *viz*. November 1, 1964.[4]

Although each and every voting change made by covered jurisdictions carries with it some political consequence, and many are motivated by political concerns, Section 5 is a statute designed and intended by Congress to protect voters from discrimination based on race and language minority status. Thus, the role assigned by Congress to the Attorney General is to use his authority under Section 5 to guard against racial discrimination in voting by reviewing each and every change to insure that they are free of the proscribed purpose and effect.[5]

Given the Attorney General's special role under Section 5, and the potential for those who enact voting and voting-related changes to be motivated by partisan concerns when such laws are passed, it is critical that the Attorney General confine his review to the racial purpose and effect of voting changes, and not insinuate himself into the political process that may have motivated a bill's passage. Moreover,

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[4] Since enactment of the Voting Rights Act in 1965 and 2001, the United States Department of Justice has reviewed 371,544 voting changes under Section 5. See http://www.usdoj.gov/crt/voting/sec_5/changes.htm.

[5] The underlying purpose of Section 5 was explained in *Beer v. United States*, 425 U.S. 130, 140-41 (1976):

> By prohibiting the enforcement of a voting-procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent states from "undo[ing]" or "defeat[ing] the rights recently won" by Negroes. H.R. Rep. No. 91-397, p. 8. Section 5 was intended "to ensure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques." S. Rep. No. 94-295, p. 19.

partisan interests often resort to litigation, and use the Voting Rights Act to advance their political goals. In such cases, it is especially important that the Attorney General strictly adhere to the time period prescribed by Congress in the preclearance process (*i.e.*, sixty days to review voting changes) to avoid giving advantage to those advancing partisan interests in the courts. He must remain above the political fray and review the voting changes for nondiscrimination in a timely manner--the precise and limited role that Congress intended. When the Attorney General has found no cause to object to a redistricting plan that is submitted for preclearance, he is duty-bound to preclear it. Unfortunately, that is not what happened here.

In this case, the Attorney General failed to fulfill his duty under the Voting Rights Act. Instead, he used his unique power under the Voting Rights Act to delay approval of a congressional redistricting map produced by a Mississippi state court thereby, rendering that plan legally unenforceable. His delay was unrelated to any legitimate purpose under the Voting Rights Act. During the delay, the Mississippi Republican Party obtained a federal court order imposing a congressional map that would become effective in the event the state court map failed to receive Section 5 preclearance by a date certain. The Mississippi Republican Party hoped that the preclearance process would be so delayed that the federal court map preferred by them would go into effect. Those hopes were realized as a result of the Attorney General's delay.

Amici do not make these arguments lightly. Indeed, over thirty-five years of experience with career professionals at the Department of Justice has taught *amici* great respect for that office and the voting rights protections that the Department of Justice has obtained. But where the Department of Justice's actions in enforcing Section 5

elevate the partisan interests of political actors over the interests of protecting minority voters, as happened here, the preclearance process is perverted and the crown jewel of civil rights, the Voting Rights Act, is tarnished. This Court must rectify that damage. Indeed, because the Attorney General's decision to preclear is not reviewable, *Morris v. Gressette*, 432 U.S. 491 (1977), there is no other way to address the Justice Department's use of technical, procedural maneuvers during the preclearance process unless this Court reviews those actions to determine whether they are beyond the scope of Section 5 and its implementing regulations.

Amici offer this final observation. In the case before this Court, the State of Mississippi promptly submitted its congressional redistricting plan for Section 5 preclearance. It did so almost immediately after the plan had been ordered into effect. Having done so, the State was entitled to a decision on the merits of its plan. Instead, it encountered a Department of Justice that reviewed Mississippi's plan not with an eye toward whether minority voters were protected, but rather with a focus on the national political implications of the congressional map. *Amici* are concerned that absent strong admonition from this Court, the Voting Rights Act will become a tool of partisan operatives rather than the potent weapon to combat racial discrimination that Congress intended when it enacted the Voting Rights Act 37 years ago. Misuse of the statute and the preclearance process not only could jeopardize its rightful use in the future, but it also has the potential to cause great harm to those persons that the Voting Rights Act was designed to protect--minority voters.

Accordingly, because the Attorney General failed to object within the statutorily-required 60-day period, this Court should reverse the decision of the three-judge court and declare the state court plan the valid and precleared congressional redistricting plan in Mississippi.

ARGUMENT

THE ATTORNEY GENERAL'S AUTHORITY UNDER THE VOTING RIGHTS ACT IS TARGETED TO PROTECTING MINORITY VOTING RIGHTS.

A. THE ATTORNEY GENERAL IMPERMISSIBLY DELAYED THE PRECLEARANCE PROCESS.

"The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting," and, to effectuate this intention, Congress "marshaled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively." *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 337 (1966).

Section 5 of the Voting Rights Act, known as the preclearance provision of the Act, provides that a covered jurisdiction--when it seeks to obtain administrative, rather than judicial, clearance for a voting change--may not enforce the change until it has been submitted to the Attorney General and he "has not interposed an objection within sixty days after such submission* * *." A change is not effectively "submitted" so as to commence the 60-day review period until the covered jurisdiction has provided the Attorney General with all information necessary for him to make an informed judgment whether the change is free of a racially discriminatory purpose or effect. *Georgia v. United States*, 411 U.S. 526, 536-541 (1973).

In *Georgia v. United States, supra,* this Court specifically upheld the Attorney General's right to request additional information. In that case, the Attorney General, two weeks after Georgia submitted its redistricting plan for review, asked for additional information about the plan. The Attorney General then interposed an objection to the plan

within sixty days of receiving the additional information he had requested, but not within sixty days of the state's initial submission. This Court rejected Georgia's claim that the redistricting plan had been precleared because the Attorney General had not acted within sixty days of the initial submission.

In upholding the Attorney General's right to make a request for relevant information about voting changes that are pending before him for preclearance, this Court did not condone abuse of the Act or its regulations by the Attorney General. Indeed, the Court specifically noted that the Attorney General, in conducting his administrative review under Section 5, should not resort to "unwarranted administrative conduct" that produces "frivolous and repeated delays"—such as demanding "unnecessary or irrelevant information." See 411 U.S. at 540, 541 n.13. Indeed, the Attorney General is not authorized to drag out the preclearance process under Section 5 by repeatedly asking for additional information. *Garcia v. Uvalde County, Texas*, 455 F. Supp.101, 105 (W.D. Tex. 1978)(three-judge court), *sum. aff'd sub nom., United States v. Uvalde County*, 439 U.S. 1059 (1979) (mem.). (Section 5 submission process "was 'dragged out' by the Attorney General's office over a 205 day period through the 'request for additional information' procedure").

As a general matter, the Attorney General infrequently asks for more information. Indeed, the Attorney General has asked for more information only three times in the post-2000 cycle in his administrative review of thirty-three statewide plans submitted by the covered States subject to Section 5. The three statewide plans to which the Attorney General asked for more information during this most recent round of

redistricting were: the Arizona legislative plan, the Louisiana state senate plan, and the Mississippi congressional plan.[6]

Amici do not question this Court's decision in *Georgia v. United States* or the right of the Attorney General to ask for more information about the voting changes that are pending before him for administrative review. When a covered jurisdiction submits the bare text and history of the legislation enacting a voting change, such information will be insufficient to enable the Attorney General to assess the purpose and effect of the change, especially when a complex voting change such as a redistricting map is being reviewed. But the right to request additional information does not give *carte blanche* authority to the Attorney General under Section 5 to extend the 60-day statutory review period by either seeking irrelevant information or by making "repeated requests for additional information." *Garcia v. Uvalde County, Texas*, 455 F. Supp.101, 104-06 (W.D. Tex. 1978)(three-judge court), *sum. aff'd sub nom., United States v. Uvalde County*, 439 U.S. 1059 (1979) (mem.). See also, *Georgia v. United States*, *supra*, at 540-41. This rule gives submitting authorities some reasonable certainty with respect to *when* they can expect to receive a decision from the Attorney General. This is especially critical if a submitting authority is seeking preclearance reasonably close to an upcoming election or the candidate-qualifying period, as is often the case with a redistricting plan.

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[6] Using the preclearance letters relating to all state-wide plans that have been adminsitratively precleared by the Attorney General under Section 5 in the post-2000 cycle, *amici* have compiled a chart listing pertinent dates of all plans submitted, and the length of time it took the Attorney General to issue his preclearance determination once he had received all information from the states. This chart is set forth in the appendix to this brief as App. A.

Mississippi submitted its congressional redistricting plan to the Attorney General on December 26, 2001, and asked for expedited consideration. With candidate qualifying set to begin on March 1, 2002, and a three-judge federal court indicating it would assert its jurisdiction over congressional redistricting absent timely preclearance of the state court plan, Mississippi asked the Attorney General to make the Section 5 determination on or before January 31, 2002.[7] Thus, the sixty-day clock began to run on December 26, 2001, and expired on February 25, 2002. By the latter date, the Attorney General was required either to ask for additional relevant information about the redistricting plan or interpose an objection to it. As shown below, he did neither.

The Attorney General did send a letter to Mississippi on February 14, 2002, requesting certain information, but the information sought from Mississippi had nothing to do with whether the redistricting plan was retrogressive in either its purpose or its effect. Indeed, the Attorney General's letter specifically acknowledged that "the Department is not formally seeking additional information regarding the redistricting plan[.]" Instead, the Attorney General concluded that because the congressional plan had been drawn pursuant to orders entered by Mississippi's Chancery Court and State Supreme Court, the plan was "directly related" to those orders and thus it "would be inappropriate for the Attorney General to make a determination concerning the congressional redistricting plan adopted by the Chancery Court."

[7] The Section 5 guidelines issued by the Attorney General provide in pertinent part: "When a submitting authority demonstrates good cause for expedited consideration, the Attorney General will attempt to make a decision by the date requested. However, the Attorney General cannot guarantee that such consideration can be given." 28 C.F.R. 31.54(b).

The Attorney General's February 14 letter then proceeded to ask Mississippi to provide information totally unrelated to the purpose or effect of the redistricting plan. For example, the letter asked the State to provide information about: the "nature and structure" of the state's judiciary; the "legal basis" for a decision of the Mississippi Supreme Court; the jurisdictional authority of Mississippi chancery courts; the number of chancery court judges in the state and the racial composition of those judges; details about how chancery court judges are elected; "safeguards in place to ensure that a particular Chancery Court judge who creates and imposes a state-wide redistricting plan has him/herself been selected in a manner reflecting the political influence of the State's minority population"; and "existing legal procedure that would prevent a potential litigant from 'forum shopping.'"[8]

The record unambiguously shows that although he admittedly possessed all of the information he needed to review the Mississippi congressional plan that had been ordered into effect by the Mississippi state court, the Attorney General refused to make the required preclearance determination. *Amici* submit that this was "unwarranted administrative conduct" (*Georgia v. United States, supra,* 540-41) that was beyond the authority of the Attorney General's limited role under Section 5.

That the congressional map ordered into effect by the Mississippi Chancery Court met the requirements of Section

[8] Although the Department of Justice Guidelines under Section 5 require state and local governments to advise the Attorney General of the "statutory or other authority under which the jurisdiction undertakes the change," (28 C.F.R. 51.27(h)), *amici* are aware of no other preclearance submissions made under Section 5 of the Voting Rights Act in which the Attorney General ever questioned the jurisdiction or authority of a state court to act.

5 is free from doubt. Under the benchmark plan for measuring retrogression under Section 5 (*i.e.*, the "old" plan), Mississippi had one congressional district that provided black voters in the state with an effective opportunity to elect the candidate of their choice, District 2. The plan drawn by the chancery court maintained District 2 as a district that would continue to provide an effective opportunity for black voters to elect a candidate of choice with a 59% black voting age population (BVAP).

The Attorney General knew that his delay in issuing a preclearance decision would have legal consequences. The federal court had made clear that it intended to order its own congressional redistricting plan into effect absent timely preclearance of the chancery court's plan. Indeed, on February 14, 2002, the same day that he wrote to the State of Mississippi refusing to make a Section 5 determination about the plan and asking for unrelated information, the Attorney General wrote to the Chief Justice of the Mississippi Supreme Court advising him that a three-judge federal court had "recently ordered implementation of its own redistricting plan for the upcoming congressional election, 'absent the timely preclearance of the redistricting plan adopted by the State Chancery Court.'" [9]

[9] The Attorney General's communication to the Mississippi Supreme Court was unusual, to say the least. The Attorney General was not a party to those proceedings, had not participated in the state court trial proceedings as a party or *amicus curiae*, and had not participated in the federal court case. Instead, he chose to insinuate himself in the process by raising concerns about the validity of the chancery court decision, and the propriety of the State's judiciary issuing redistricting decisions. *Amici* are unaware of any similar action taken by the Attorney General during a Section 5 review process in the 37 years of the Act's existence. Indeed, in view of his prompt and unquestioning review of a redistricting plan issued by a state court in North Carolina just a few months later, see pp. 15-18, *infra*, it appears that the Attorney General's handling of the Mississippi submission was unique.

But the Attorney General's refusal to grant preclearance to Mississippi's congressional map also had political consequences. Failure to meet the federal court's preclearance deadline meant that the federal court's map, which had been advocated by the Mississippi Republican Party in the federal litigation, would become the congressional redistricting plan in the 2002 elections and beyond. The federal court's map, like the chancery court's map, maintained District 2 as an effective minority district and paired the same two incumbents (Reps. Shows-D and Pickering-R) in another district (District 3). But it was in the configuration of this latter district that the federal court's map differed significantly from the chancery court's map.

The Shows-Pickering district under the state court's map contained a substantial black voting age population (BVAP) of 37.53%. Under the federal court's map, the BVAP in the Shows-Pickering district was 30.37%. Furthermore, whereas the state court's map had paired these two incumbents in a district that was regarded as either leaning Democrat or a political toss-up, the federal court's map placed Reps. Shows and Pickering in a district that was widely viewed as giving Pickering the advantage. See, *e.g.*, Thomas B. Edsall, *Federal Panel Imposes Miss. Redistricting Plan; Outcome Favors Republican Rep. Pickering*, The Washington Post, February 27, 2002, at A2; Thomas B. Edsall, *Democrats Challenge Justice's Redistricting Review in Miss.*, The Washington Post, February 16, 2002, at A2 (quoting Rep. Pickering's campaign manager as saying that the Justice Department's delay in granting preclearance "increases the likelihood that the pro-Pickering federal court plan will be used in the 2002 elections"); and Stuart Rothenberg, *Rothenberg's Ramblings:*

Politics from California to Mississippi, Roll Call, March 1, 2002.

The similarity of the Attorney General's February 14, 2002 letter with the arguments being made by the Mississippi Republican Party in the litigation is striking. Indeed, the items requested of Mississippi by the Attorney General and the concerns he expressed about the propriety of the chancery court issuing a redistricting plan--notwithstanding an express ruling by the Mississippi Supreme Court that the chancery court did possess such authority--seem to have been taken directly from arguments contained in the pleadings filed by the Mississippi Republican Executive Committee in the litigation and in letters sent to the Department of Justice.

For example, on January 11, 2002, the Mississippi Republican Party Executive Committee ("Committee") filed a submission to the three-judge court attaching a letter the Committee had sent to the Attorney General expressing their opposition to preclearance of the chancery court plan. The Committee's January 11th submission questioned the basis for the Mississippi's Supreme Court's decision, claiming that the "Supreme Court has given no explanation for the submitted change[.]" The Attorney General's February 14th letter asked the State to "explain the State's view of the legal basis for the Mississippi Supreme Court decision" adding that the Attorney General viewed that decision as "unclear." Similarly, the Committee's submission complained that Mississippi would be unable to show that a chancery court judge who imposes any future redistricting plan on the state "will have been chosen by a method which guarantees equal influence by all racial groups[.]" The Attorney General parroted this concern in his February 14th letter, asking the State to "describe any safeguards in place that a particular Chancery Court judge who creates and imposes a state-wide redistricting plan has him/herself been selected in a manner

reflecting the political influence of the State's minority populations."

The Attorney General used his authority under the Voting Rights Act to solicit information that was irrelevant to the plan's purpose and effect, and he used arguments made by one of the partisan litigants to craft his letter. The Attorney General refused to issue his preclearance decision, and he instead issued a request to the state to provide answers to questions being posed by one of the political party litigants. Such actions lend the appearance that the Attorney General relinquished his role as an independent decisionmaker. But, most fundamentally, as in *Garcia*, the Attorney General impermissibly "dragged out" the preclearance process by inappropriate employment of the "request for additional information" procedure. Thus, by virtue of the Attorney General's failure to properly interpose a timely objection, the state court plan should be declared precleared and validly enforceable.

B. THE UNIQUE AND IMPROPER MANNER IN WHICH THE ATTORNEY GENERAL HANDLED THE MISSISSIPPI CONGRESSIONAL REVIEW IS CONFIRMED BY HIS SUBSEQUENT HANDLING OF A COMPARABLE SUBMISSION FROM NORTH CAROLINA.

The Attorney General's dilatory handling of the Mississippi submission stands in sharp contrast to his expedited review and preclearance of North Carolina's legislative plans just a few months later. In North Carolina, a state court judge invalidated North Carolina's state senate and state house maps that had been enacted by a Legislature controlled by Democrats. The state court judge then drew his own plans and submitted those plans for Section 5

preclearance to the Attorney General on June 5, 2002.[10] On June 28, 2002, the state judge voluntarily provided supplemental information to the Attorney General about the plans. And on July 12, 2002, the Attorney General precleared the maps. The Attorney General's preclearance came just 14 days after the state court judge had completed his submission of the plans to the Attorney General and only 30 days after the state court judge initially submitted the two plans for preclearance.

But the difference in the Attorney General's handling of the Mississippi and North Carolina submissions goes beyond the time period involved in conducting his review. Both plans were drawn by a state court. While in the Mississippi submission the Attorney General considered the exercise of state court jurisdiction to be a change subject to Section 5 preclearance requirements, the Attorney General apparently failed to consider the North Carolina state court's exercise of jurisdiction to be a voting-related change requiring preclearance. To be sure, if the first time exercise of jurisdiction by a state court over a statewide redistricting case were a change in Mississippi, then the first time exercise of jurisdiction by a state court of jurisdiction over a statewide redistricting case in North Carolina would have been a change as well.[11]

Furthermore where the Attorney General had written to Mississippi requesting extensive information about the state court system, its judges, and even the propriety of a state court-ordered plan, see p.12, *supra,* he failed to pose a single question about the North Carolina judicial system or

[10] The letter of submission from the North Carolina state court judge is reproduced in the appendix to this brief as App. B.

[11] *Amici* have been unable to find a single case decided by a North Carolina state court prior to 2002 in which a state trial court exercised jurisdiction over any statewide redistricting case.

the implications of a single judge ordering into effect a state court plan.[12] Moreover, although the Attorney General had regarded the exercise of jurisdiction by the Mississippi Chancery Court as a change under Section 5 (and presumably used that as a basis for his February 14, 2002 letter), the Attorney General never raised that as an issue in the North Carolina submission. The Attorney General's inconsistent approach to handling these two similar submissions is striking.[13]

C. THE ATTORNEY GENERAL'S REQUEST FOR INFORMATION FROM MISSISSIPPI ALSO DIFFERED SUBSTANTIVELY FROM THE INFORMATION THAT HE USUALLY HAS SOUGHT FROM STATES REGARDING THEIR REDISTRICTING PLANS.

The Attorney General's request for additional information from Mississippi differed significantly from his usual requests for additional information in his post-2000

[12] Like Mississippi, North Carolina elects its trial judges. See *Republican Party of North Carolina v. Martin*, 980 F.2d 943 (4th Cir. 1992).

[13] This is not to suggest that the Attorney General's actions in granting immediate preclearance to North Carolina's state court map, with no questions asked, lacked political motivation. Indeed, the opposite may have been true. As noted above, the legislative plans invalidated by the state court in North Carolina had been drawn by the North Carolina Legislature, where Democrats control both chambers. Democrats hold a slim majority of the seats in the North Carolina House (see ***http://www.ncsl.org/ncsldb/elect98/partcomp.cfm?yearsel=2002)***. The new legislative maps imposed by the state court judge were ordered in a lawsuit brought by North Carolina Republicans, and the state court's decision there has been widely reported as favorable to Republicans. See, Sharif Durhams, *Judge's Districts May Yield GOP Edge*, Charlotte Observer, June 1, 2002, p.1A; and Lynn Bonner, *Maps rejected*, The Raleigh News & Observer, June 1, 2002, p. A1.

Section 5 review of other statewide plans. As noted above, see p. 10, *supra*, aside from Mississippi, the Attorney General only asked for more information in connection with two other statewide maps, Arizona's legislative plan and the Louisiana senate plan. In the case of Arizona, for example, the letter seeking additional information asked for election data, voter turnout data, registered voter data and other basic information properly needed to evaluate minority voting strength under the map.[14] Similarly, the Attorney General's letter to Louisiana asked for information about the plan's demographics, alternative plans considered, minutes and transcripts of legislative activity about the plans, and election data.[15]

In both Arizona and Louisiana, the information sought by the Attorney General was clearly necessary to measure minority voting strength under the proposed plans--the only issue that the Attorney General is obliged to consider under section 5. The fact that the Attorney General's additional information letter to Mississippi deviated so substantively from the ordinary and relevant types of information that the Attorney General customarily seeks when he makes a decision to seek more information suggests a flawed review process. The improprieties of the review process are revealed by the fact that the Attorney General has not normally sought such additional information from States about their statewide maps in the post-2000 cycle, but chose to do so in Mississippi.

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[14] The Attorney General's letter sent to Arizona officials requesting additional information is reproduced in the appendix to this brief as App. C.

[15] The Attorney General's letter sent to Louisiana officials requesting additional information is reproduced in the appendix to this brief as App. D.

D. THE ATTORNEY GENERAL'S FAILURE TO ISSUE A PROMPT SECTION 5 DECISION TO MISSISSIPPI STANDS IN SHARP CONTRAST TO HIS EXPEDITED REVIEW IN OTHER SECTION 5 COVERED STATES.

The length of time that the Attorney General took to review Mississippi's state court map also raises concerns about the review process. In nearly every other statewide map reviewed by the Attorney General under Section 5, the Attorney General acted quickly once he had all information necessary to make a decision. As noted above, see note 2 *supra*, *amici* have compiled a chart of all the statewide submissions made by states in the post-2000 cycle that are subject to the preclearance requirements of Section 5. This chart shows that once the Attorney General had received all information from a state concerning its statewide plan, the average amount of time it took the Attorney General to make his preclearance determination was merely 23 days.[16] This is in sharp contrast to the time line in Mississippi, where the Attorney General received a complete submission from Mississippi on December 26, 2001, and failed to make a Section 5 determination about the plan either within the initial 60 days after he received the submission, or within

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[16] Because some states subject to Section 5's preclearance requirements are only partially covered, *amici* have also compared the Attorney General's untimeliness in Mississippi to submissions from states that are, like Mississippi, fully subject to Section 5. In these other fully covered states (Alabama, Alaska, Arizona, Louisiana, Texas and Virginia), the average time it took the Attorney General to make his Section 5 determination was 25 days. Even if the comparison is further limited to states that were fully covered and submitted congressional plans to the Attorney General (*i.e.*, Alabama, Arizona, Louisiana, and Virginia), the average length of time for the Attorney General to issue a preclearance decision was only 44 days. App. A. Each of these states has more congressional districts than Mississippi.

sixty days of receiving the information sent to him by the State in reply to his February 14, 2002 letter requesting information.[17] This type of procedural departure from the norm is further proof of a flawed process.

E. THE INFORMATION SOUGHT FROM MISSISSIPPI DEVIATED FROM INFORMATION IDENTIFIED AS RELEVANT BY THE ATTORNEY GENERAL IN HIS OWN GUIDELINES.

In preparation for the post-2000 cycle, the Attorney General issued redistricting guidelines in January 2001 to state and local governments subject to the Act's preclearance requirements. These guidelines, entitled "*Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c,*" (hereafter, "2001 Redistricting Guidelines") explained how the Department of Justice would analyze redistricting plans and the information that would be utilized by Department staff to conduct such an analysis. See Federal Register: January 18, 2001 (Volume 66, Number 12) pp. 5411-5414.

The 2001 Redistricting Guidelines made clear that the Attorney General's focus under Section 5 was to determine retrogression by comparing the proposed redistricting plan to the existing (*i.e.*, benchmark) plan. With regard to the information that the Attorney General would need to make the retrogression comparison, the 2001 Redistricting Guidelines list as relevant information "boundaries" of districts, "population data", "demographic and election data",

[17] *Amici* agree with appellants that even if this court concludes that the Attorney General did not preclear the congressional map because he sought additional information within the first sixty days, his failure to object to the plan within sixty days of receiving a response to his February 14 letter resulted in preclearance of the plan by operation of law.

"election history" and "voting patterns."[18] This was precisely the kind of information that Mississippi had provided to the Attorney General in its December 26, 2001 submission. More importantly, none of the information that the Attorney General sought from Mississippi in the February 14th letter is identified as being relevant in the Attorney General's 2001 Redistricting Guidelines. Moreover, not a single item identified in the 2001 Redistricting Guidelines was among the items requested by the Attorney General's lengthy and unprecedented February 14th request for information. *Amici* submit that the Attorney General's demand that Mississippi provide information far beyond and not even contemplated by the Attorney General's own Redistricting Guidelines is further indication that the Attorney General abused his authority under the Voting Rights Act.

In sum, Mississippi made a complete submission of its congressional redistricting plan; the Attorney General admitted he had sufficient information to review it; and the Attorney General simply refused to do his duty and render a decision.[19] In this instance, the statute itself provides the answer as to the proper outcome. The redistricting plan is deemed precleared by operation of law. See 42 U.S.C. 1973c.

[18] Amici do not question the propriety of the Attorney General seeking such information to make the Section 5 determination. Indeed, such data would seem directly relevant to making the retrogression decision under Section 5.

[19] Amici have been unable to identify a single instance in which the Attorney General, over the last thirty-seven years of enforcing Section 5, has refused to make a Section 5 determination despite being in possession of all information needed to make the required preclearance decision.

F. THE ATTORNEY GENERAL'S REQUEST FOR ADDITIONAL INFORMATION TO MISSISSIPPI WAS FRIVOLOUS AND AN ABUSE OF HIS AUTHORITY UNDER THE VOTING RIGHTS ACT.

This is not the first time that the Attorney General's actions processing a preclearance submission under Section 5 have been challenged as unreasonable. In *Garcia v. Uvalde County, Texas*, *supra*, 455 F. Supp. 101, a three-judge court concluded that the Attorney General did not have the right to extend the 60-day review period by repeatedly requesting additional information on a piecemeal basis, even if the information being sought was relevant to the voting change at issue. In *Garcia v. Uvalde County*, the County submitted a redistricting plan for Section 5 preclearance to the Attorney General. After 58 days had elapsed, the Attorney General formally requested additional information from the County, and later requested additional information. When the Attorney General eventually objected to the redistricting plan, a three-judge court found that the Attorney General had improperly dragged out the preclearance process and that the plan had become precleared by operation of law. This Court summarily affirmed. *United States v. Uvalde County,* 459 U.S. at 1059.

We submit that just as the Attorney General may not drag out the process by repeatedly asking for more information, he similarly may not manipulate the timing of the Section 5 preclearance process by asking for additional, irrelevant information. Such conduct is unreasonable and an abuse of his authority under the Voting Rights Act.

CONCLUSION

This Court should reverse the judgment of the three-judge district court and remand the case with instructions to dissolve the injunction and dismiss the case.

Respectfully submitted,

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ADMINISTRATIVE DETERMINATIONS OF PRECLEARANCE BY THE ATTORNEY GENERAL OF STATEWIDE REDISTRICTING PLANS IN POST-2000 CYCLE[1]

State/Plan	Date Initially Submitted to AG	Date Submission Was Completed[2]	Date of Preclearance	Congressional Candidate Qualifying Deadline	Days Pending With AG After Submission Was Complete
Alabama				4/5/02	
Cong	2/1/02	2/20/02	3/04/02		12 days
House	9/5/01	9/27/01	11/5/01		39 days
Senate	8/16/01	9/18/01	10/15/01		27 days
Alaska[3]				6/1/02	
House	8/1/01	8/29/01	10/1/01		33 days
Senate	8/1/01	8/29/01	10/1/01		33 days
House	4/29/02	5/29/02	6/10/02		12 days
Senate	4/29/02	5/29/02	6/10/02		12 days
Arizona[4]				6/12/02	
Cong.	2/28/02	2/28/02	3/26/02		26 days
California				12/7/01	
Cong.	10/1/01	10/9/01	11/30/01		52 days
House	10/1/01	10/9/01	11/30/01		52 days
Senate	10/1/01	10/9/01	11/30/01		52 days
Florida[5]				7/19/02	
Cong.	5/1/02	5/28/02	6/7/02		10 days
Senate	5/1/02	6/12/02	6/20/02		8 days
Louisiana[6]				8/23/02	
Cong.	2/1/02	3/1/02	4/2/02		32 days
Senate	2/6/02	5/16/02	7/2/02		47 days
Michigan				5/14/02	
Cong.	12/14/01	2/4/02	2/11/02		7 days
House	12/14/01	2/4/02	2/11/02		7 days
Senate	12/14/01	2/4/02	2/11/02		7 days

[1] This chart was prepared using all of the post-2000 preclearance letters of statewide plans obtained from the United States Department of Justice, and is complete through August 1, 2002. Copies of these letters are being lodged with the Clerk of this Court. Qualifying deadlines for congressional districts were obtained from state election codes.

[2] In most cases, States make an initial submission of a redistricting plan and then voluntarily supplement the submission with additional information. Once all the information has been submitted to the Attorney General that is needed to make an administrative determination, the submission is deemed complete by the Attorney General and the sixty-day period for review of the plan begins on this date. Accordingly, this date was used to calculate how long a completed submission was pending before the Attorney General because it was, according to the preclearance letter sent by the Attorney General, the last date on which the State supplemented its submission to the Attorney General with additional information about its redistricting plan.

[3] Alaska has only one congressional seat; thus, there was no congressional redistricting in that state.

[4] Arizona's legislative maps were the subject of an objection by the Attorney General. See http://www.usdoj.gov/crt/voting/sec 5ltr/1 052002.htm

[5] Florida's House plan was the subject of an objection by the Attorney General. See http://www.usdoj.gov/crt/voting/sec 5ltr/1 070102htm.

[6] Louisiana's House plan is pending before the District of Columbia court for judicial preclearance.

State/Plan	Date Initially Submitted to AG	Date Submission Was Completed	Date of Preclearance	Congressional Candidate Qualifying Deadline	Days Pending With AG After Submission Was Complete
Mississippi				3/1/02	
Cong.	12/26/01		no decision		* * * *
House	4/17/02	5/30/02	6/17/02		18 days
Senate	4/17/02	5/30/02	6/17/02		18 days
New Hampshire					
Cong.	4/12/02	5/7/02	6/10/02	6/14/02	34 days
New York				7/11/02 (postponed by court order)	
Cong.	6/11/02	6/17/02	6/25/02		8 days
House	5/01/02	6/3/02	6/17/02		14 days
Senate	5/01/02	6/3/02	6/17/02		14 days
North Carolina				3/1/02 (postponed by court order)	
Cong.	12/17/01	12/17/01'	2/15/02		60 days
House	12/11/01	1/31/02	2/11/02		11 days
Senate	12/3/01	1/31/02	2/11/02		11 days
House	6/12/02	6/28/02	7/12/02		14 days
Senate	6/12/02	6/28/02	7/12/02		14 days
South Dakota[7]				4/2/02	
House	5/19/02	6/5/02	7/19/02		44 days
Senate	5/19/02	6/5/02	7/19/02		44 days
Texas[8]				1/3/02	
Senate	8/17/01	10/3/01	10/15/01		12 days
Virginia				4/12/02	
Cong.	8/17/01	9/14/01	10/16/01		32 days
House	5/02/01	6/4/01	6/15/01		11 days
Senate	5/11/01	6/7/01	7/9/01		32 days

Note: Two States subject to the preclearance provisions of Section 5 did not make submissions of statewide plans to the Attorney General: Georgia (which submitted its three statewide plans for judicial preclearance to a three-judge district court in the District of Columbia (see *Georgia v. Ashcroft*, 204 F.Supp.2d 4 D.D.C. 2002)), and South Carolina (where all three statewide plans were drafted by a federal court after state authorities failed to enact maps (see *Colleton County Council v. McConnell*, 201 F.Supp.2d 618 D.S.C. 2002)).

In addition, North Carolina and Alaska's 2001 legislative maps were struck down by state courts and replaced with new plans, which were precleared.

[7] South Dakota has only one congressional seat: thus, there was no congressional redistricting in that state.

[8] Texas' congressional map was drawn by a three-judge federal court. Texas' House plan was the subject of an objection by the Attorney General under Section 5. See http://www.usdoj.gov/crt/voting/sec. 5/ltr/1 111601.htm.

APP. B

[SEAL]

State of North Carolina

General Court of Justice
Superior Court District 11B

KNOX V. JENKINS JR.
SENIOR RESIDENT
SUPERIOR COURT JUDGE

P.O. BOX 2739
SMITHFIELD NC 27977

TELEPHONE (919) 989-5629
FAX: (919) 934-1760

June 5, 2002

Mr. Joseph Rich
Chief, Voting Rights Section
Civil Rights Division
U.S. Department of Justice
Washington, DC

Attention: Mr. Chris Herren

Dear Mr. Rich:

In its ruling in *Stephenson v. Bartlen*, the North Carolina Supreme Court named the Superior Court of Johnston County, North Carolina, as having jurisdiction over this matter.

I am herewith transmitting court orders regarding this matter, including my orders of May 31, 2002 (principal order and its amendment), which codified new, Court-drawn interim redistricting plans for the NC House and Senate to be used for the 2002 elections cycle.

Hereby, I am requesting pre-clearance, under Section 5 of the Voting rights Act, for "Interim House Redistricting Plan for NC 2002 Elections" and "Interim Senate

Redistricting Plan for NC 2002 Elections". Enclosed are reports detailing the Census 2000 demographic statistics for each of the 120 House and 50 Senate districts, tables of population variances, and tables showing the - racial composition of the districts in comparison to the Sutton 3 and Constitutional VRA Senate redistricting plans pre-cleared by your department late last year. A CD-ROM containing maps images of these new interim House and Senate districts and associated "block equivalencies" is also provided herewith.

Given the fact that the North Carolina 2002 election schedule is already significantly behind schedule, this court would appreciate your expeditious review and pre-clearance of these interim plans so the people of North Carolina will be able to cast their ballots in a timely manner. This court has appointed Mr. Marshall L. Turner, Jr., of Upper Marlboro, Maryland to serve as the Court's preclearance agent to assist the Court in seeking preclearance. Mr. Turner has been in touch with Mr. Herren and you and stands ready to answer any questions you may have, as do I.

Thank you for your attention to this matter of urgent interest to the North Carolina electorate.

Yours truly,

/s/ Knox V. Jenkins, Jr.
Honorable Knox V. Jenkins, Jr.

[SEAL] **APP. C**

U.S. Department of Justice
Civil Rights Division

Voting Section, NWB.
950 Pennsylvania Avenue, N. W.
Washington, DC 20530

JDR;JR;ALP 3 dh
DJ 166-012-3

2002-0586

April 8, 2002

The Honorable John J. Hainkel, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

Dear Senator Hainkel:

This refers to Act No. 1 of the 2nd Extraordinary Session of 2001 of the Legislature of Louisiana, which provides the redistricting plan for the Louisiana State Senate, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on February 6, 2002.

Our analysis indicates that the information sent is insufficient to enable us to determine that the proposed plan does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, as required under Section 5. The following information is necessary so that we may complete our review of your submission:

1. Please provide the following: (a) all instructions or directions given to the demographer(s) regarding the development of alternative and proposed plans; (b) all

discussions, whether formal or informal, involving any state official, employee, or the demographer(s) concerning the relative merits and demerits of alternative and proposed plans; (c) the circumstances in which each alternative or draft plan was presented or considered by any state officials, and the reason(s) why each alternative was rejected. Please provide copies of any alternative or draft plans that were devised, considered, discussed, or announced, whether formally or informally, by any state official or employee, demographer/consultant, member of the public, or organization, including 2000 Census total and voting age population and voter registration data by race for all plan(s) considered by the state, by race and by district, along with a map depicting the boundary lines, for each such plan. You may omit any information that you have previously provided.

2. A current map, preferably a 2000 Census map, that shows the residence of each incumbent member of the Senate.

3. A detailed explanation for decreasing the black total and voting age populations in proposed District 7 and what, if any, consideration was given to the effect of the reductions on black electoral opportunity. If the state relied on any studies and/or analyses to conclude that black residents were not able to elect candidates of their choice in this district under the benchmark plan, please provide a copy of these studies and/or analyses.

4. Copies of minutes or transcripts of the House floor debate on the final passage of the redistricting legislation and the following House or Senate documents that refer or relate to the proposed change; (a) all documents, including notes, memoranda, summaries, minutes, tapes and

transcripts of all informal discussions, meetings and hearings; (b) all newspaper articles, editorials, letters to the editor, arid advertisements, as well as any other publicity, that address or describe the proposed change. You may omit sending transcripts of public hearings and newspaper articles on the proposed redistricting plan that you may have already provided.

5. The election returns you provided with your initial submission were incomplete. As set forth below, please provide election returns noting: each candidate's name and race; the total number of persons who voted and the number of black persons who voted, by precinct; and the number of registered voters, by race and voting precinct, at the time of the election. If such registration data are unavailable, provide an estimate of the black population percentage by precinct at the time of the election and the basis for any such estimate.

a. With regard to elections conducted within either the benchmark or proposed District 7, please provide the information detailed above for all elections for all state offices since 1992; and

b. For elections conducted in all other districts, please provide the information detailed above for *those* in which a black candidate ran for office.

The Attorney General has sixty days to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when we receive the information specified above. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.37). However, if no response is received within sixty days of this request, the Attorney General may object to the proposed changes consistent with the burden of proof placed upon the

submitting authority. See 28 C.F.R. 51.40 and *51.52(a)* and (c). Changes which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10. Therefore, please inform us of the action the State of Louisiana plans to take to comply with this request.

If you have any questions concerning this letter or if we can assist you in obtaining *the* requested information, you should call Ms. Autumn Payne (202-514-6335) of our staff. Refer to File No. 2002-0586 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Joseph D. Rich
Chief, Voting Section

[SEAL] **APP. D**

U.S. Department of Justice
Civil Rights Division

Voting Section, NWB.
950 Pennsylvania Avenue, N. W.
Washington, DC 20530

DR RPL : **BLA**:LLO: SLL : nj : **j** dh
DJ 166-012-3
2 002-0276

March 26, 2002

Lisa T. Hauser, Esq.
Gammage & Burnham
Two North Central Avenue, 18th Floor
Phoenix, Arizona 85004-4402

Jose De Jesus Rivera, Esq.
Haralson, Miller, Pitt & McAnally
3003 North Central, Suite 1400
Phoenix, Arizona 85012-2151

Dear Ms. Hauser and Mr. Rivera:

This refers to the 2001 legislative redistricting plan for the State of Arizona, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on February 28, 2002; supplemental information was received through March 19, 2002.

Our analysis indicates that the information sent is insufficient to enable us to determine that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority

group, as required under Section 5. The following information is necessary so that we may complete our review of your submission:

1. A listing of each voting precinct used by Maricopa, Pirna, Pinal, Cochise, Santa Cruz, Gila, La Paz, and Yuma Counties in 1998 and 2000 elections and their district assignment in the benchmark plan and in the proposed plan.

We note that the statewide voter registration file that you provided to us on February 28, 2002, has a data field for 2000 precinct assignments to the proposed plan; however, that category was approximately 80 percent incomplete. We also note that the underlying data for the competitiveness conclusion in Appendix 30(F-1) of your submission appear to be drawn from precinct-level data. Please provide copies of all documents, data, and information used to prepare Appendix 30(F-1).

2. Election returns, by voting precinct, for Maricopa, Pima, and Pinal Counties, for all county-wide elections in which Hispanic, Native American, and African-American candidates participated during the 1998 and 2000 primary and general elections. For each election, indicate: (a) the office/position sought (indicate the incumbent(s), if any, and whether the incumbent was elected or appointed); (b) each candidate's name and race/ethnicity; (c) the number of votes each candidate received, by voting precinct (indicate the winners and those who went to a runoff); (d) * the total number of registered voters, by race/Spanish surname and by voting precinct, at the time of the election; and the total number of registered voters by race/Spanish surname who cast a ballot in each precinct; and (e) a map showing the precinct boundaries for each election. If

registered voter data are unavailable for any election, provide voting age population by race/ethnicity by voting precinct. To the extent that the state has already provided some of the requested information in the required formats, it need not be resubmitted. In that regard, we note that some of the election returns already provided lack an appropriate data dictionary and none of the county returns identify candidates by race or provide the information requested in subpart (d) above.

Any data in an electronic format that the state provides in response to this request should follow the format specified in the Procedures 28 C.F.R. 51.20(b) and include a relevant data dictionary or dictionaries with the election returns

3. Please provide the factual basis for the state's conclusion that Hispanics and other racial minority groups encompassed in the state's "total minority" category as identified by your submission will vote cohesively in both primary and general elections under the proposed plan. In particular, detail how the voting patterns in proposed Districts 13, 14, 15, 16, 27, and 29 support the claim that minorities under the proposed plan will have effective exercise of the electoral franchise. Provide copies of any documents, data, studies, and/or analyses, etc., considered by the state in reaching this conclusion.

4. Provide the factual basis, including copies of any documents, data, studies, and/or analyses, etc., that the state relied on in reaching the conclusion that, as a result of the reduction in the number of districts in which minority citizens can elect candidates of their choice, the plan will not result in a retrogression in their position with respect to the effective exercise of the electoral franchise. In particular, with regard to the proposed districts in Maricopa, Pima, and Pinal Counties, detail the extent of

the state's consideration to the following factors in reaching this conclusion: total minority population; minority voting-age population; total Hispanic population; Hispanic voting-age population; and data concerning electoral behavior and participation, such as voter registration information, Spanish surname voter registration, voter turnout data, and election returns.

The Attorney General has sixty days to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when we receive the information specified above. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.37). However, if no response is received within sixty days of this request, the Attorney General may object to the proposed change consistent with the burden of proof placed upon the submitting authority. See 28 C.F.R. 51.40 and 51.52(a) and (c). Changes which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10. Therefore, please inform us of the action the State of Arizona plans to take to comply with this request.

If you have any questions concerning this letter or if we can assist you in obtaining the requested information, you should call Mr. Bruce L. Adelson (202-514-1049) an attorney in the Voting Section. Refer to File No. 2002-0276 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Joseph D. Rich
Chief, Voting Section

Supreme Court, U.S.
FILED
AUG 26 2002
OFFICE OF THE CLERK

(10)

No. 01-1437

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

BEATRICE BRANCH, RIMS BARBER, L.C. DORSEY, DAVID RULE, JAMES WOODWARD, JOSEPH P. HUDSON AND ROBERT NORVEL,
Appellants

v.

JOHN ROBERT SMITH, SHIRLEY HALL and GENE WALKER, and ERIC CLARK, Secretary of State of Mississippi, MIKE MOORE, Attorney General of Mississippi, RONNIE MUSGROVE, Governor of Mississippi, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE, and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,
Appellees

On Appeal From The United States District Court
For The Southern District of Mississippi

BRIEF OF *AMICI CURIAE* ROBERT C. JUBELIRER AND MATTHEW J. RYAN IN SUPPORT OF AFFIRMANCE ON A NARROWER GROUND

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AUGUST 26, 2002

19 pp

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Richard A. Posner, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (Princeton Univ. Press 2001) 11, 12

INTEREST OF *AMICI CURIAE*[1]

Robert C. Jubelirer is the Lieutenant Governor of the Commonwealth of Pennsylvania and the President *Pro Tempore* of the Pennsylvania Senate. Matthew J. Ryan is the Speaker of the Pennsylvania House of Representatives.

Amici are defendants in *Vieth v. Commonwealth*, an action presently pending before a three-judge court in the United States District Court for the Middle District of Pennsylvania (No. 1:CV-01-2439). In that case, plaintiffs challenged the constitutionality of state legislation (Act 1) putting in place a congressional redistricting plan for the Commonwealth of Pennsylvania following the 2000 decennial Census. Implementation of Act 1 was enjoined on the basis of a 19-person population deviation held to violate the principle of one-person, one-vote. 195 F. Supp.2d 672 (April 8, 2002) (three-judge court). The propriety of that and other rulings in the federal court proceeding are presently at issue in three direct appeals and a conditional cross-appeal before this Court (Nos. 01-1817, 01-1823, 01-1873 & 02-135). Following the invalidation of the Act 1 plan, the Pennsylvania General Assembly passed another congressional redistricting plan (Act 34), which the federal court plaintiffs allege does not cure the unconstitutionality found in the Act 1 plan.

Amici were also respondents in a state court action challenging the Act 1 plan – *Erfer v. Commonwealth* (Pa. Supreme Ct. No. 14 M.M. 2002; Pa. Cmwlth. Ct. No. 10 M.D. 2002). There, the Supreme Court of Pennsylvania, at petitioners' request, assumed plenary jurisdiction of and

---

[1] Both Appellants and Appellees consent to the filing of this *amicus* brief. Letters of consent are on file with the Clerk of Court. No counsel for a party authored this brief, in whole or in part, and no person or entity other than the named *amici* made a monetary contribution to the preparation of this brief. *See* Supreme Court Rule 37.6.

addressed only petitioners' state constitutional claims and ultimately dismissed them. 794 A.2d 325 (Pa. 2002).

The interpretation of U.S. CONST. art. I, §4, the core of the present appeal, was addressed in the state court proceedings in Pennsylvania and is implicated in two ways in the federal court proceedings involving *amici*.[2] In their role as defendants and also as Presiding Officers of the Pennsylvania General Assembly (the body given exclusive authority by U.S. CONST. art. I, §4 to do congressional redistricting for Pennsylvania), *amici* have a substantial interest in the proper interpretation of this critical constitutional provision.[3]

SUMMARY OF ARGUMENT

The decision of the three-judge court below that U.S. CONST. art. I, §4 barred the Chancery Court of the First Judicial District of Hinds County, Mississippi from

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[2] In the state court proceedings in *Erfer*, *amici* argued that under a proper interpretation of U.S. CONST. art. I, §4 no independent state constitutional claims had been or could have been presented. *See* 794 A.2d at 331 (rejecting argument with little analysis).

In the federal court proceedings in *Vieth* concerning Act 1, plaintiffs argued to the three-judge court and to this Court (in their Jurisdictional Statement for Appeal No. 01-1873) that U.S. CONST. art. I, §4 operates as a restriction against partisan gerrymandering independent of the Fourteenth Amendment. In connection with the Act 34 plan (which replaced the Act 1 plan), plaintiffs contend that a county's alteration of a voting precinct boundary forming part of the boundary between two congressional districts causes a greater population deviation in the Act 34 plan than in Act 1. *Amici* responded, *inter alia*, that such alteration cannot affect the congressional boundary line set by Act 34 because to do so would violate U.S. CONST. art. I, §4.

[3] *Amici* adopt the Statement of the Case set forth in the Appellees' Motion to Affirm.

adopting a congressional redistricting plan should be affirmed but on narrower grounds. Article I, §4 does not bar state courts from addressing challenges to congressional redistricting plans so long as the challenges are based on federal law. A state court, however, is barred from addressing challenges to the validity of a congressional redistricting plan based solely, as here, on state law.

ARGUMENT

I. Narrower Ground For Affirmance

The decision below should be affirmed but on a narrower ground as to the interpretation of U.S. CONST. art. I, §4 than that employed by the three-judge court. Significantly, Appellants, who were plaintiffs in the action before the Chancery Court of the First Judicial District of Hinds County, Mississippi, raised no federal law-based challenges in state court. Rather, they sought injunctive relief "to insure compliance with Mississippi law." *See* Motion to Affirm at 3 (citing Mtn. App. 1).

A state court (provided it has jurisdiction under state law) must, under the Supremacy Clause (U.S. CONST. art. VI, cl. 2), invalidate a duly-enacted congressional redistricting plan that violates the federal constitution or federal law. It can then proceed to draw a replacement plan should the state legislature fail to do so. However, as discussed below, a state court can neither invalidate nor draw a congressional redistricting plan based solely on a violation of state statutory or state constitutional law because actions of a state legislature taken pursuant to U.S. CONST. art. I, §4 are subject only to federal requirements.

II. Interpretation Of Key Constitutional Provisions

A. U.S. CONST. art. I, §4

U.S. CONST. art. I, §4 provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

This provision is an express constitutional grant of authority to state legislatures and to Congress to regulate the time, place and manner of congressional elections. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932) (the words of art. I, §4 "embrace authority to provide a complete code for congressional elections"); *Oregon v. Mitchell*, 400 U.S. 112, 119 (1970) ("In the very beginning the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations if it deemed advisable to do so"). As Justice Black noted in *Oregon*, U.S. CONST. art. I, §4 "was a compromise between those delegates to the Constitutional Convention who wanted the States to have final authority over the elections of all state and federal officers and those who wanted Congress to make laws governing national elections." 400 U.S. at 119 n.2 (citing 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 280-92 (1st ed. 1833)).

There is no question that legislation enacted pursuant to U.S. CONST. art. I, §4 is subject to review under federal constitutional principles. *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986) (authority granted under U.S. CONST. art. I, §4 "does not extinguish the State's responsibility to observe the limits

established by the First Amendment rights of the State's citizens"); *Wesberry v. Sanders*, 376 U.S. 1, 6-7 (1964) (U.S. CONST. art. I, §4 cannot be interpreted in a manner that would "immunize" from judicial scrutiny a congressional redistricting plan that debases a citizen's right to vote in violation of the federal constitution).

B. U.S. CONST. art. II, §1, cl. 2

This Court recently considered a parallel constitutional provision (U.S. CONST. art. II, §1, cl. 2), which provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors ... ." Like Article I, §4, Article II, §1, cl. 2 provides an exclusive grant of authority to the legislatures of each state. As this Court explained in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 76 (2000) (*per curiam*):

> [I]n the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the elections of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, §1, cl. 2, of the United States Constitution.

See also U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 (1995) (the federal constitution provides a role for the states in the federal electoral process only in select clauses which are "express delegations of power to the States to act with respect to federal elections").

In *Palm Beach County*, this Court intimated that the decision of the Supreme Court of Florida changing the manner in which the state's electors are to be selected under state law violated the exclusive power of the state

legislature under U.S. CONST. art. II, §1, cl. 2.[4] The *per curiam* opinion cited the cautionary language in *McPherson v. Blacker* that states:

> [Art. II, §1, cl. 2] does not read that the people or the citizens shall appoint, but that 'each State shall' and if the words 'in such manner as the legislature thereof may direct' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.

531 U.S. at 76 (quoting 146 U.S. 1, 25 (1892) (brackets original)).

In the subsequent case of *Bush v. Gore*, 531 U.S. 98, 103 (2000), this Court granted *certiorari* to address the following question: "whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, §1, cl. 2, of the United States Constitution ... and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses." The *per curiam* opinion in

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[4] The remand in *Palm Beach* directing the Supreme Court of Florida to identify the "extent" to which it had relied on the state constitution, *see* 531 U.S. at 78, when assessed in the context of the case as a whole, suggests that, if the state court had relied exclusively on substantive provisions of the state constitution, it may have run afoul of U.S. CONST. art. I, §4. To the extent, however, that the Supreme Court of Florida relied on the state constitution as an interpretative tool to analyze the meaning of the Florida Election Code, such use would not have raised an issue under U.S. CONST. art. I, §4.

Bush v. Gore invalidated the state court decision on the grounds that it required a remedy which violated equal protection.

Chief Justice Rehnquist, joined in his concurring opinion by Justices Scalia and Thomas, would have reversed the decision of the Florida Supreme Court on the additional ground that it violated U.S. CONST. art. II, §1, cl. 2. *See Bush v. Gore*, 531 U.S. at 111 (Rehnquist, C.J., concurring).

The concurring Justices first explained why federal principles governed:

> Of course, in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. See U.S. Const., Art. IV, §4. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, § 1, cl. 2, provides that 'each State shall appoint, in such Manner as the *Legislature* thereof may direct,' electors for President and Vice President. ... In McPherson v. Blacker, we explained that Art. II, § 1, cl. 2, 'conveys the broadest power of determination' and 'leaves it to the legislature exclusively to define the method' of appointment. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.

Id. at 112-114 (Rehnquist, C.J., concurring) (internal citations omitted, emphasis original).[5]

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[5] To the extent that Justice Stevens in *Bush v. Gore* suggested that the legislative power in Florida was subject to

After cautioning that "with respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate," *id.* at 114, the concurring Justices then offered their alternative holding:

> What we would do in the present case is precisely parallel [to the holding in *Bouie v. City of Columbia*, 387 U.S. 347 (1964)]: Hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.

Id. at 115 (Rehnquist, J., concurring) (footnote omitted). They also explained that:

> This inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

Id. (Rehnquist, J., concurring) (emphasis original).

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judicial review pursuant to the Florida Constitution, he was in the dissent and appeared, moreover, to suggest that the legislation was subject to judicial review in the state courts, not that such review would be conducted under substantive provisions of the state constitution imposing greater limitations than the federal constitution. *See* 531 U.S. at 123-24 (Stevens, J., dissenting).

C. Federal law governs

As the *Bush* cases and earlier persuasive authority suggest, federal law governs review of legislation enacted by state legislatures under the authority of U.S. CONST. art. I, §4. *See Palm Beach County Canvassing Board*, 531 U.S. at 76; *Bush v. Gore*, 531 U.S. at 111-16 (Rehnquist, C.J., concurring); *see also Opinion of the Judges*, 37 Vt. 665 (1864) (state legislation providing that absentee Civil War soldiers could vote in elections for state and federal offices from outside the state invalidated under state constitution with regard to state offices but upheld as authorized by U.S. CONST. art. I, §§2 & 4 with regard to federal offices); *Opinion of the Justices*, 45 N.H. 595, 599 (1864) (state legislation vesting absentee Civil War soldiers with right to vote for federal Representatives and electors upheld under U.S. CONST. art. I, §4 even though in direct conflict with state constitution; "the question as to the election of Representatives to Congress and of Electors of President and Vice President is governed wholly by the Constitution of the United States as the paramount law, and the Constitution of this State has no concern with the question, except so far as it is referred to and adopted by the Constitution of the United States"); *see also Baldwin v. Trowbridge*, 2 BARTLETT CONTESTED ELECTION CASES, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess. 46, 48 (1866) (Majority Report from Committee on Elections resolving to seat Rowland E. Trowbridge as Representative from 5th Congressional District of Michigan; reasoning that votes cast by Civil War soldiers outside of Michigan were valid even though forbidden by state constitution because (1) power to direct time, place and manner of holding elections for Representatives was conferred on state legislature *eo nomine*, and not on convention authorized to prescribed fundamental law of the state; and (2) "the people of Michigan had no power to enlarge or restrict the language of the Constitution of the United States" via the state constitution); *McPherson*, 146 U.S. at 34-35 (citing

Senate Rep. 1st Sess., 43 Cong. No. 395 (1874)).[6] Various commentators have also embraced this interpretation of the *Bush* cases and the relevant constitutional provisions.[7]

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[6] The Report provided:

> The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States; and it is, no doubt, competent for the legislature to authorize the governor or the Supreme Court of the State, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.

McPherson, 146 U.S. at 34-35 (quoting Senate Rep., 1st Sess., 43 Cong. No. 395 at 9).

[7] *See* Richard A. Epstein, SYMPOSIUM: BUSH V. GORE: "'In Such Manner as the Legislature Thereof May Direct': The Outcome in *Bush v. Gore* Defended," 68 U. CHI. L. REV. 613, 620 (Summer 2001) ("[I]n this case, the strong federal interest in the selection of the President of the United States makes it appropriate for federal courts to see that all state actors stay within the original constitutional scheme. ... If therefore the state courts or state executive officials have failed properly to apply the state scheme, resulting in a gross deviation from the legislature's directives, then a federal court can review the matter under Article II"); Michael W. McConnell, SYMPOSIUM: BUSH V. GORE: "Two-and-a-Half Cheers for *Bush v. Gore*," 68 U. CHI. L. REV. 657, 661 (Summer 2001) ("By specifying 'the Legislature' [in U.S. CONST. art. II, §1, cl.2] as the source of

For federal elections (presidential as in *Bush*, congressional as in this case), where the national interest is supreme and uniformity of standards is important, federal law provides the ceiling against which state regulation of elections are tested. Neither the state constitution nor the state judiciary can impose substantive standards more stringent than, or at variance with, federal law, nor can the state courts interpret state law or the state constitution in a manner that frustrates the federal delegation.

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state law, this Clause departs from the usual principle of federal constitutional law, which allows the people of each state to determine for themselves how to allocate power among their state governing institutions"). *See also* Richard A. Posner, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (Princeton Univ. Press 2001) at 110-11:

> Normally the U.S. Supreme Court defers to a state supreme court's interpretation of the state's statutes. But if Article II grants authority to state legislatures, it may authorize the Supreme Court to protect the prerogative thus granted. The Constitution having appointed a particular organ of state government to be the Presidential election rulemaker, it is a question of federal law whether the state judiciary has allowed the designated organ to determine the manner in which the state shall select its Presidential electors. ... The power to appoint the electors is a federal power that the states exercise as agents of the federal government. By assigning to state legislatures the task of determining the manner by which federal electors would be picked, Article II may be supposed to have federalized disputes over whether the authority thus granted to those legislatures has been usurped by another branch of state government, including a court that invokes a vague provision of the state's constitution to displace the legislature's authority and in effect write its own election code.

The task of congressional redistricting is explicitly assigned by the federal constitution to the state legislatures, which are, by their very nature, political entities. As this Court has repeatedly recognized, congressional redistricting is inherently a political process. *See e.g.*, *White v. Weiser*, 412 U.S. 783, 794-96 (1973) ("From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination;' ... Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task") (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). This political task should not be subject to being usurped by a state court – generally a less representative entity than a state legislature, whose members, if elected, perform a very different function in state government. Yet, this is the inevitable consequence if a state court interprets a state constitution in a manner that frustrates the federal delegation, as this Court does not have the option to act as a final arbiter of state constitutional interpretation.[8] By interpreting U.S. CONST. art. I, §4 to federalize congressional redistricting, state inter-branch power struggles can be avoided.

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[8] *See also* McConnell, "Two-and-a-Half Cheers for *Bush v. Gore*," *supra* n.7 at 661-662 (offering two "functional justifications" for why the framers of the Constitution assigned the task of defining the method of appointing electors to the state legislatures under U.S. CONST. art. II, §1, cl. 2: "First, the provision ensures the manner of selecting electors will be chosen by the most democratic branch of the state government" and "Second ... legislatures, in contrast to courts and executive officials, must enact their rules in advance of any particular controversy."); Posner, BREAKING THE DEADLOCK, *supra* n.7 at 156 ("there is much to be said for an interpretation of 'Legislature' in Article II that by forbidding gubernatorial and state judicial involvement in the selection of electors, except insofar as the legislature expressly delegates a role in that selection to the governor or the courts, minimizes the risk of an interbranch dispute").

This is not to say that state constitutions are always irrelevant in the congressional redistricting context; any substantive protections they might provide simply cannot exceed those imposed by the federal Constitution.[9] Where a state constitutional provision is interpreted in the same manner as its federal counterpart, state constitutional claims raised in the context of congressional reapportionment would have no independent vitality but would merge with federal constitutional claims raising the same challenges. For example, the equal protection guarantee of the Pennsylvania Constitution is the same as that of the federal constitution. *See Erfer*, 794 A.2d at 332 (right to equal protection under state constitution is "coterminous with its federal counterpart") (citing *Love v. Borough of Stroudsburg*, 597 A.2d 1137 (Pa. 1991)).

Actions of a state legislature taken pursuant to U.S. CONST. art. I, §4 are subject only to federal substantive requirements.

III. Application

In this case, Appellants did not raise any federal law-based challenges in the state court. Instead, citing the failure of the Mississippi Legislative Standing Joint Congressional Redistricting Committee to timely submit a new congressional redistricting plan as required by state law, they simply asked the state court to adopt a plan. As explained above, however, consistent with U.S. CONST. art. I, §4, a state court may only act to draw a congressional redistricting plan where it has adjudicated and found a

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[9] *Amici* do not mean to suggest that legislatively-enacted congressional redistricting plans are immune from challenges based on state constitutional requirements pertaining to the procedure for enacting legislation.

violation of federal law.[10] As that did not occur here, it was appropriate for the federal three-judge court below to find the state court plan unconstitutional.

CONCLUSION

Amici respectfully request the Court to affirm the decision of the three-judge court below but on the narrower ground of the interpretation of U.S. CONST. art. I, §4 advocated herein.

Respectfully submitted,

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[10] In a situation such as occurred in Mississippi, where a state legislature is unable or unwilling to discharge the authority delegated to it by U.S. CONST. art. I, §4, both the state and federal courts would have the authority to adjudicate whether that failure violated any federal law. Here, however, Appellants alleged only that the failure violated state law.